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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 122.

JOHNSTON ARMSTRONG, ANCILLARY RECEIVER FOR THE NEW SOUTH BUILDING AND LOAN ASSOCIATION OF NEW ORLEANS, LOUISIANA, APPELLANT,

vs.

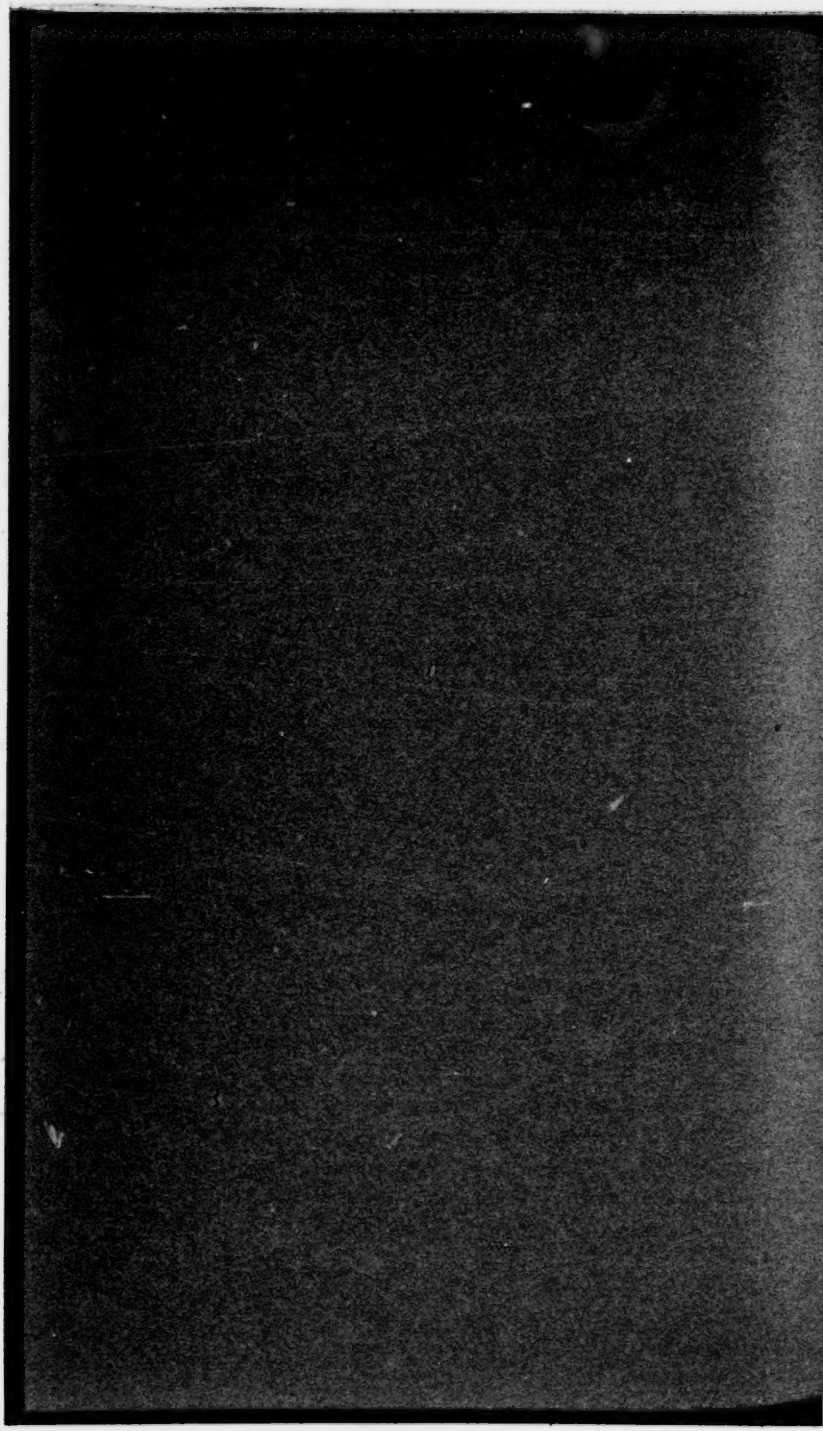
JAMES A. ASHLEY, MARY M. ASHLEY, HAYDEN H. ASHLEY, RALPH B. ASHLEY, MARY A. BRECKENRIDGE, HENRY F. BEARDSLEY, JOSEPH R. BEARDSLEY, AND EMMA B. JUNKINS, APPELLEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF COUNSEL FOR APPELLANT.

BLAIR LEE,
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This case stands upon appeal from a decree entered in the Court of Appeals of the District of Columbia, June 25, 1903 (Printed Record, 301), affirming with costs the decree of the Supreme Court of the District of Columbia, entered January 27, 1903 (R., * p. 513), dismissing the bill of complaint.

The references in this brief are to pages of the record from the court below, which constitute the star pages in the record as printed in this court, unless otherwise stated.

The bill (R., 1) was filed May 1, 1901, under authority (R., 17) and by order of court (R., 21), for the purpose of having an equitable lien declared against certain real estate situated in square 939 of the city of Washington, to the extent of the value of the improvements erected thereon, for the appointment of a trustee to sell the same for the purpose of discharging the lien, and for general relief.

The bill of complaint avers that The New South Building and Loan Association of New Orleans, Louisiana, was in 1893 and 1894 conducting a national building and loan association business, with its home office and directors located in New Orleans, Louisiana; that, after the exercise of due and customary precautions more particularly set forth, including the making of diligent inquiry as to the condition of the title of said real estate and the value thereof, it, in good faith and without notice of any adverse claim to the property, granted a builders' loan, on the building-association plan, of twenty thousand dollars ($20,000.00) unto one Aaron Bradshaw, of Washington, D. C., and that, before any advancement was made thereon, a deed of trust on said real estate to secure the same was duly executed by said Bradshaw and wife in favor of John Henson Kennard and Johnston Armstrong, trustees, under date of October 28, 1893, which was recorded among the land records of the District of Columbia on October 30, 1893; that thereafter, as the construction of these six dwelling-houses on the property progressed, the full amount of the loan was slowly advanced through a period of over five months from the time of recording the deed of trust, in five installments, the first being for $4,000.00, paid about November 29, 1893, and the last of $7,000.00, paid after the buildings were completed, on April 12, 1894.

That after the completion of the houses on said property and the advancement, in good faith, of twenty thousand dollars ($20,000.00), by means of which the improvements were wholly erected, default having been made in the pay-

ments required, it was discovered by the association that there was existing at the date of the execution of the trust and at the time of the making of the advances a controversy between certain of the appellees or their ancestors and said Bradshaw over the title to the property, and that there was then pending ejectment suits involving an undivided four-fifths interest in the property.

In the bill it is averred in detail how the existence of this litigation was fraudulently withheld by said Bradshaw, John H. Walter, president of the local board in Washington, D. C., and W. E. Aughinbaugh, the local attorney chosen by the said local board, who made the first examination and favorable report on the title some months before the loan was actually granted, making no reference to the then pending ejectment. The bill sets forth in detail the national building association plan of making loans only to stockholders, through local boards, and avers that the members of the local board, in contemplation of law, were not agents of the corporation association.

It is further averred that the association had no reason to distrust at any time the members of the local board or the said Bradshaw, or the fidelity of the said Aughinbaugh, but was led to believe that he was an attorney in good standing and a member of the bar of the Supreme Court of the District of Columbia.

By amendment to the bill of complaint (R., 50 and 510), it is further averred that the ejectment suits pending at the time said first report on title, as originally filed, did not include the land in controversy, which first became involved in the litigation by amendments to the declarations, made in March, 1893, and that the court docket was defective, in that it did not show that the property involved herein was affected by ejectment suits; that if the docket had been posted in the proper and customary manner in this regard the pendency of said suits would have been discovered and reported in the continuation of title to said property, made by

the District Title Insurance Company from the 1st day of June to the 23d day of September, 1893; also by the examination and continuation of title made for said association by Walter H. Acker, an attorney of the District of Columbia and successor to the said W. E. Aughinbaugh as attorney for said local board, in the preparation of which continuation said Acker made a personal examination of the records from the 26th day of May to and including the 1st day of November, 1893, in which examination said Acker had occasion to and did carefully examine all entries as to lots in square 939 then appearing in the two volumes kept by the clerk of the Supreme Court of the District of Columbia, purporting to contain a complete (numerical) index to all pending ejectment suits, which said indexes were universally used by those examining or making continuations of title; that the plaintiffs in said ejectment suits, well knowing the fact that said Bradshaw was capable of practicing the very character of fraud perpetrated in this instance, and that the lawyers would rely on said general indexes for reference to any pending ejectment suits, nevertheless utterly failed and neglected to advise and have the clerk of said court make the necessary entries on the said general indexes of ejectment suits when the property involved was brought into them by amendment.

In the bill of complaint it is further averred that immediately after the recording of said deed of trust there was commenced the erection on the land of six two-story, six-room, modern brick and stone dwelling-houses, respectively numbered 215 to 225 9th street N. E., which in the course of time were completed at a cost to the association of twenty thousand dollars ($20,000.00), the expense thereof being paid by the association in accordance with the well-known building-association plan, as the buildings severally progressed and pursuant to the provisions of the bond and the deed of trust given to secure the same; that said Bradshaw is hopelessly insolvent, and that said Aughinbaugh has disappeared,

and that said Walter, at the time of the transaction especially, was then regarded as of high standing and responsibility.

It is further averred that the erection of said buildings by and with the money of the association, and each stage in the progress thereof, was within the personal knowledge of defendant James A. Ashley, representing himself as well as Nehemiah B. Ashley, and defendants Mary E. Breckenridge and the Beardsleys, and, well knowing, as did each of them, that said association would not have made such advances had it been cognizant of the condition of the title, or the suits pending with respect thereto, as then known to said defendants and as concealed from the association as aforesaid at the time of the transaction and during the whole period involved in the making of the payments and completion of buildings, forming, as they did, a conspicuous and substantial and valuable improvement to the land; that no notice whatsoever from said parties whose property was being so benefited or any of the defendants was given to the association, notwithstanding their information from the public record of the contents of the deed of trust, the domicile and officers of the association, and the further well-known plan of payment of such advances by all building associations during and never wholly until completion of buildings being erected; that the defendants had record notice that the association was located in the city of New Orleans through said deed of trust, and knew that the loan and advances would and could not have been made in its behalf save through the fraud and deceit of some party interested in securing the loan, and that the defendants should in good conscience and equity have given notice to the association as to the state of the title and claims of defendants with respect thereto, but that nevertheless they stood by and permitted said expenditures to be deliberately made, to the great loss and injury of the association, and they are estopped and cannot now deny that the complainant, in behalf of the association, has an equitable lien, as its receiver, on the land

and premises described to the extent of the value of the improvements placed thereon.

That the value of the improvements when made far exceeded the value of the land upon which the same were placed; that so great an expenditure under the circumstances of the defendants' pending suits was notice to any fair-minded person, having knowledge of such suits and the claims they represented, that the expenditure was of necessity being made as a result of fraud or deceit and threw a burden in equity and good conscience on the claimants to the land, whom the complainant avers on information and belief knew that said expenditure was being made, and it was their duty to have either addressed to the association a warning or else be estopped in equity from taking the benefit of the expenditure without just compensation; that by standing by and permitting the improvements to be made under such unusual circumstances they took the chance of such improvements having been brought about by fraud and deceit and are now estopped in equity and good conscience to assert their legal title without compensation for such improvement; that their silence in the face of these great expenditures was misleading and calculated to and did aid and abet fraud and deceit being practiced on the association and calculated further to bring about the improvements on the land which the defendant then claimed to own or did own as stated.

That, irrespective of said estoppel and irrespective of the claimants having stood by with knowledge, as aforesaid, and permitted the improvements to be made, having investigated the title with diligence and having entered upon the transaction and loan in good faith, under the belief that the title therein for the security of the loan was a good title, and having no notice of any defect in the title, and being without knowledge of the adverse claim of the claimants and without notice from them or any of them of any right or claim whatever thereto, complainant has a right to an equi-

table lien declared upon the premises for the protection or remuneration of the association to the extent of the improvements placed thereon.

The bill prays for the declaration of such lien, for the appointment of trustee to sell the property and pay the complainant his proportionate share of the proceeds of the sale, and for general relief.

All the defendants, now appellees, save one, Joseph R. Beardsley, joined in an answer (R., 31), in which they admitted the formal allegations of the bill, the execution of the trust, and averred that Bradshaw had no valid title to the ground; that they had no knowledge concerning the advances alleged to have been made under the deed of trust nor of the default thereunder. They admit the pendency of ejectment suits to recover lots designated 1, 2, 3, and 20, in square 935, and aver that the same are otherwise sometimes known as lots 3, 4, 5, and 6 of the same square; that said suits had been pending for several years and were matters of public record prior to the deed of trust and advances made; that they have since been determined in favor of the appellees, who are now and for some time past have been in actual occupation and enjoyment of the property under the judgments in said action.

They aver, more in detail, that said Walter was a speculator in real-estate titles in the District of Columbia, and that, pursuant to this business, about the year 1889, he obtained deeds from persons claiming to be the heirs of one George Walker, conveying two entire squares, including the land involved herein, and a very large number of original lots in other squares in the city of Washington, to said Walter; that said Walter made a pretended subdivision of the lots and conveyed the same to said Bradshaw or to his wife, and said Bradshaw took violent, forcible possession thereof, the said property being then vacant and unimproved, by erecting at the southwest corner of the square (on a lot not involved herein) a small brick edifice, built in two days, and protected while in

the course of construction by a number of colored men armed with sticks and stones, employed by said Bradshaw for that purpose, the remainder of the property being contemporaneously inclosed by a fence; whereupon four ejectment suits were instituted, including one by Henry F. Beardsley, to recover possession of the same; that pending these suits "the said Walter or the said Bradshaw, or both of them, proceeded to erect thereon the improvements described in the bill, *obtaining for the purpose, and upon the security of the deed of trust to Kennard and Armstrong above referred to, certain advances from the said The New South Building and Loan Association,* as these defendants were informed subsequent to the completion of the said houses, but not prior thereto."

The defendants further aver that the association was bound to take notice of said suits, and that "any examination of the land records would have disclosed the fact that the title of George Walker had been made the subject of tax deeds for very many years prior to said deed of trust."

They aver affirmatively that they had no knowledge whatsoever of the frauds practiced upon the association and were wholly free from any participation therein or connection therewith. They do not deny the allegations of the original bill, to the effect that they had personal knowledge of the erection of the buildings from the beginning to their conclusion; they aver that on January 4, 1894, after they had learned of Bradshaw's "connection with the buildings," they notified one Childs in person he would be held liable as trespasser, etc., a copy of which alleged notice is attached to the answer as a part thereof; said alleged notice purports to have been signed (R., 43) by appellee James A. Ashley in his own right and as attorney-in-fact for Nehemiah B. Ashley, father of appellees Mary M., Hayden H., and Ralph B. Ashley and Emma B. Junkins, and appellee Mary A. Breckenridge and as next friend for appellee Joseph R. Beardsley. The alleged notice states that said Childs is represented to them as contractor and builder of certain houses, etc., and

he is advised that "if such is the fact he or his agents will be held as trespassers," and that "they will not be responsible for any liabilities contracted by the Mr. Bradshaw."

The answer further avers that it was not until about the month of February, 1895, that the Ashleys learned the details of the advances having been made by the association under the deed of trust, etc.

The answer further affirmatively avers a certain alleged offer of sale by appellees of their interests in the property to the association on the basis of prices *asked* for neighboring unimproved property and alleging the offer to have been made by reason of "the peculiar circumstances of the case" (said averment as to such alleged offer was not supported by proof); that the association employed counsel and united its efforts with those of Bradshaw and Walter to defeat the defendants, protracting the litigation until April, 1901, and until after the decision of the Supreme Court of the United States rendered further efforts impracticable, subjecting defendants to costs, etc., "and to losses in the depreciation in market value pending the said litigation in the aggregate materially exceeding the present actual value of the improvements," as they believe; they aver "that it was no part of their business to guard the interest of the building association," even had they been aware of the facts with respect to all of the frauds alleged in the bill. They aver record notice to the complainants and deny any such notice to themselves, or that they "are estopped to deny the claim of the said association that it has an equitable lien, or any lien," for the advances made, and aver their silence did not create any equity against them. They deny knowledge of the exact amount expended in the erection of the buildings and improvements and aver that the same are not now worth the sum of $20,000 or any sum approximating that amount.

The separate answer of Joseph R. Beardsley adopts the answers of the other appellees as his answer. He avers that he is a mere reversioner as to the property in controversy,

after the life estate of his father, appellee Henry Beardsley, and that he has never at any time had any agent in respect to said property, nor any earlier nor better knowledge of the advances made than was possessed by his codefendants, as shown by their answer.

To these answers general replications were filed (R., 49).

The documentary evidence and oral testimony adduced on behalf of the appellant, hereinafter more fully discussed, though voluminous, was clear and convincing and comports with the allegations of the bill. A certified copy of the docket entries in the ejectment action of Henry F. Beardsley (R., 415) shows that the same was filed December 9, 1895, and was therefore not pending at the date of the deed of trust, as averred in the joint answer.

It appears from the testimony that at the time the loan was granted there stood in the name of Aaron Bradshaw what was then regarded, both by the Columbia Title Insurance Company (R., 169 and 174) and the Real Estate Title Insurance Company (R., 319 to 326 and 365) of the District of Columbia, the proprietary title to the property, which property was in the actual possession of Bradshaw, and that in the opinion of the Real Estate Title Insurance Company the outstanding tax titles under which the appellees claimed were void (R., 365 and 159 and 160).

It was further shown that no actual knowledge of the possession of the appellees prior to Bradshaw's possession was ever acquired by any officer or agent of the association not involved in the fraud.

It was further shown that there was gross fraud perpetrated on the association by members of its local board, in which W. E. Aughinbaugh, the local attorney, participated, it being shown that he received from Bradshaw, the fraudulent grantor, for his examination and report on the title, $250 (R., 382), about eight times the amount ordinarily charged by title companies here at the time for similar reports, and that in his report approving the title and de-

claring it good he made no mention of the pendency of ejectment suits (R., 327 and 328); that after Aughinbaugh ceased to be the attorney for the local board and before the loan was granted by the home office, the matter of the title was referred to Mr. Walter H. Acker, a reputable member of the bar of the District of Columbia, who succeeded Aughinbaugh as local attorney (R., 315 and 313), having in his hands Aughinbaugh's report upon the title (R., 327 and 328), a chain of title signed by Mr. Ashford, president of the Real Estate Title Insurance Company, an examiner of high repute (R., 319 *et seq.*); a continuation of title signed by Eugene Carusi, president of the District Title Insurance Company (R., 329), and a copy of a certificate of title (R., 365), which had been issued by the Real Estate Title Insurance Company on the order of John H. Walter (R., 156), covering the property in question and dated September 16, 1892, in which certificate Mr. Ashford, president of that company, pronounced the proprietary title good, the outstanding tax titles void, and the then pending equity suit, dismissed for failure to prosecute before this loan was granted, as not well founded (R., 159 and 160 and 365).

With these papers in his possession, Mr. Acker accepted as correct the report of Aughinbaugh to its date, and Mr. Acker continued the Aughinbaugh report, making an abstract of all changes in the title to and including the date of recording the trust which conveyed the property for the security of the association.

In making his continuation Mr. Acker testifies that he had recourse (R., 204) to the general indexes of ejectment actions, compiled and kept open by the clerk of the Supreme Court of the District of Columbia for the use of attorneys and the public and used and relied on by the clerk in giving information as to such cases. This general index was in the form of a numerical index, giving under each square all lots involved in ejectment suits then or previously pending. In this manner Mr. Acker covered the ground in respect to

ejectment suits, as shown on this general index, from the beginning (R., 393), and but for the inaccuracy, shown in detail by the testimony, in the docket from which the general index was accurately compiled, he would have discovered the existence of the pending ejectment suits. The property involved in this suit was brought into the ejectment cases by way of amendments, filed in March, 1893, to proceedings filed in 1891; these amendments, thus bringing the property in this suit into old ejectment suits, were not noted upon the face of the docket (copy of face of docket in the three suits, R., 398, 407, and 412) so far as to show that new land had been brought into the suits, and the face of the docket, purporting to give all of the land involved in the ejectment suits, thus failed to show that the land in this cause was involved. Each docket has a special numerical index, bound in the same volume, purporting to give the land in ejectment suits, and the same omission was made in respect to the special docket index (R., 435) from which, and from the face of the docket as well, the general index, which was examined by Mr. Acker, had been correctly compiled.

Mr. Acker forwarded to the home office at New Orleans all of the original papers turned over to him, including the Aughinbaugh report, with his continuation, and including a final certificate signed by him as "attorney and abstractor," dated November 1, 1893, in which he, among other things, said:

"I hereby certify that I have carefully examined the public records of the District of Columbia from May 26, '93 to November 1, '93, and find that the mortgages before mentioned, and all other liens and encumbrances named in W. E. Aughinbaugh's first certificate, or that have since been created, have been satisfied and discharged of record, that all bonds or notes secured by said loans or encumbrances, have been canceled and surrendered; * * * that *there are no proceedings commenced in the State or United States courts which affect this land;* * * * and that in my opinion, the title is good and valid in fee simple in Aaron

Bradshaw, * * * subject only to the trust deed of the New South Building and Loan Association of New Orleans, Louisiana, which is described in the abstract to which this certificate is attached." (Italics ours.)

It was shown by the testimony of the president and general counsel of the company that the application for the loan was finally passed (R., 104) upon the strength of this certificate; it was shown by the testimony of the assistant general counsel for the association, who drew the checks, that the general board of directors, under whose authority the loan was granted, was without knowledge of any defect in the title whatsoever (R., 128), and both of these general officers testified that the matter was investigated and the loan made in good faith.

Mr. Acker visited the buildings at each stage of construction that called for a payment before turning the money over, and found Bradshaw in possession, and he states that the structures appeared to correspond to the contract and as certified to by the architect. He was not notified from any source of an adverse claim upon the site of the buildings until after the last payment was made.

No evidence was introduced in support of the averments by the defendants in their answer with respect to the alleged notice to Childs, the bricklayer, or the alleged negotiations for compromise. It was stipulated of record (R., 159) that Joseph R. Beardsley was born March 27, 1875, which made him under twenty-one years of age at the time of the alleged offer to sell. There is no denial by the appellees of knowledge of the fact that the buildings were being erected from the very beginning of the work thereon until their completion, and no attempt is made to explain why the defendants did not inquire into the facts with respect to the source from which funds were derived with which the buildings were constructed. The evidence, as well as the answer of the defendants, also shows that at the date of the trust and the erection of the improvements Bradshaw and Walter were known to

and regarded by the appellees as designing and irresponsible characters (R., 235-236). There is no evidence adduced as to what was learned by Mr. James A. Ashley from said Childs when he, as alleged, delivered in person the so-called notice to him, nor is any explanation given why appellees contented themselves with this one alleged notice to a bricklayer. James A. Ashley, the attorney-in-fact and next friend of the owners, according to the alleged notice itself, an attorney practicing before the Patent Office (R., 12), residing near the land in question (R., 129-138), was not placed on the stand. There was an utter failure on the part of the defendants to explain or attempt to explain their attitude, save and except as contained in the answer referred to, namely, that there was no obligation on their part, notwithstanding fraud, to make inquiries with respect to who was making the advances or to give notice to the association of their claim of title.

The testimony adduced on the part of appellees, as defendants below, related principally to the value of the land and improvements and costs claimed to have accrued in connection with the trial of the ejectment suits and the mode of compilation in the office of the clerk of the index to the ejectment suits. It was admitted by Henry F. Beardsley (R., 259-260) that the land embraced in the ejectment suits not affected by the improvements was greater in area and value than the lots occupied by the six houses and described in the trust. It was also admitted by Mr. Beardsley (R., 264) that at the trial in ejectment objection was raised on the part of the plaintiffs in ejectment, appellees herein, to the submission of any testimony showing the existence of the loan of the association or the improvements made.

From the testimony on both sides it is clearly shown by a preponderance of evidence that this phase of the matter, as far as possible, was kept from the jury and the defense to the ejectment suits was made in behalf and in the name of Aaron Bradshaw, defendant thereto; that John F. Walter

was vitally concerned in the outcome of the suits, so much so that in case of compromise between the building association and the appellees the latter fully expected to have to continue to contend against both Walter and Bradshaw (R., 18 and 24); that, save and except the retainer fee of $250 paid by the association to Mr. William F. Mattingly as special counsel for the association (R., 34), the means of the association itself was not used in the ejectment litigation. By a power of attorney (R., 191) dated September 18 and *recorded* October 1, 1894, among the land records of the District of Columbia, Bradshaw and wife empowered Walter H. Acker to take charge of the buildings, collect the rents therefrom and expend them, first, in the defense of the title of Bradshaw to the land, and, second, to turn over the balance thereof to the association to be applied on his obligations to it. The undisputed testimony is (R., 34) that of the rents so received by Acker at the time of the institution of this suit and taking testimony herein no part had been received by the association or its receivers. The proof submitted in support of the germane allegations of the bill and the amendment offered thereto will be hereinafter more fully discussed under appropriate subdivisions.

The case was heard in the Supreme Court of the District of Columbia, which passed a decree (R., 513) dismissing the bill for reasons more particularly set forth in the opinion of the court (R., 513), rendered by Mr. Justice Hagner, in which opinion it appears that the court considered the amendment to the bill of complaint and the matters involved therein.

In this opinion it was, among other things, held:

"That the courts will not interfere to grant active relief to a *bona fide* purchaser, who, without notice of the true state of the title, has made permanent ameliorations and improvements, if he brings such suit in equity against the true owner after the latter has recovered the property at law."

Following this doctrine (Anderson *vs.* Reed) and further imputing knowledge through its fraudulent grantor and agents, and of the court proceedings, to the association, Mr. Justice Hagner denied the relief sought, holding, however, that knowledge of the conveyances and of the deed of trust must be imputed to the appellees, the court saying:

"There is evidence in the record that facts might readily have been ascertained by them (appellees) from which they might well have learned at an earlier time * * * of the source from which the money employed was derived.

"Recalling their former experiences with Walter and Bradshaw in the erection of the brick shanty on these lots; their aforesaid defense of that building and their possession and inclosure of the lots, with their subdivisions by Walter, the defendants under their conviction of the illegality of the means by which they had been thwarted in the obtention of their rights by Walter and his associates might well have assumed that any similar practices respecting property should be ascribed to the said parties. A slight inspection would have shown that before their notice to the said Childs the excavations for buildings were in progress on their lots; and the land records would have disclosed the numerous conveyances of the lots, suspicious in their appearance, which culminated in the deed to Bradshaw and his deed of trust to secure the association for the large amount of $40,000 named therein; all of which must have been printed and generally read by business people in the Register of Conveyances, published every week day. If the defendants knew nothing of this, they were probably only of the small minority of business men who had not observed it. I therefore think knowledge of these conveyances and of the deed of trust to the association at earlier dates than those assigned in the answer must be imputed to the defendants."

An appeal was duly taken to the Court of Appeals of the District of Columbia, which affirmed the court below with costs. The opinion of the Court of Appeals was rendered by Mr. Justice Morris, who, among other things to be hereinafter more particularly discussed, said:

"In disposing of this case we might well, perhaps, adopt the excellent opinion filed in it by the learned justice who heard it in the court below. That opinion is thorough and elaborate and satisfactorily disposes of all of the questions raised by the record."

A further appeal was duly taken to this court.

Assignments of Error.

The Court of Appeals of the District of Columbia erred in its decree (R. Print., 301) affirming the decree (R. Print., 282) of the Supreme Court of the District of Columbia dismissing the bill of complaint, and in the opinion (R. Print., 294) on which said action was based endorsing the opinion of the lower court (R., 514), as follows:

I.

In holding, in effect, that the action of the appellees—whose own claim was based upon prior possession only, and while themselves out of actual possession, with full knowledge of the erection on the property of six substantial and valuable stone and brick houses while said property was in actual possession of said Bradshaw, a person known by them to be without means and capable of the perpetration of fraud, in standing by, without effort on the part of said appellees to warn the improver, the association, which, as grantee of record upon the security of said land and the improvements thereon being erected, was slowly supplying the funds with which said buildings were being built—did not thereby subject said land to an equitable lien in favor of the association to the extent of the value of the improvements erected by it in good faith.

II.

In holding, in effect, that although the appellees were found in the opinion of the lower court (adopted by the

Court of Appeals *in toto*) to have had knowledge of the improvements and of the deed of trust, there was no duty imposed upon them to warn the association against the fraud being perpetrated upon it, and that, in the presence of obvious gross fraud being perpetrated upon the association, enhancing the value of their property, the appellees might rely upon the implied notice to the association by pending ejectment suits without thereby conniving and concurring in the fraud, and that the appellees' conduct throughout appears to have been fair and reasonable.

III.

In holding, in effect, that the appellant bases his claim of knowledge on the part of the appellees on mere constructive notice to them involved in the recording of the deed of trust.

IV.

In holding "that an occupant of land, who has entered upon it in the honest belief that it is his own and who has in good faith improved it, is not entitled after having been evicted by the true and lawful owner, to claim an equitable lien for his improvements against such true and lawful owner," and in following in this respect Anderson *vs.* Reed (14 D. C. App., 54).

V.

In holding, in effect, that because said Bradshaw, the grantor of the association, was an occupant in bad faith, that therefore the association, as grantee of an occupant in bad faith, can have no better right in equity than its grantor.

VI.

In holding, in effect, in the determination of the question of good faith of the association in the premises, that there

must be imputed to the association "knowledge of the various suits that had been brought by the defendants before advance of the money by the association," and by reason of the knowledge so imputed "its possession and control of the improvements upon the lots cannot be considered as that of an innocent holder without notice."

VII.

In holding, in effect, that the omission of any reference to the land involved herein from the original docket of the court and the special docket index, both of which purported to show the land involved in the ejectment suits, and from the general index thereto, compiled by the clerk of the court at public expense and purporting to give a complete list of the lands in square 939 involved in ejectment suits, and the examination of said general index by the title examiner for the association, are not pertinent to the case at bar; that such general indexes were not required by law to be kept, and therefore a certified copy of the entries thereon is inadmissible in evidence; that the appellees were in no way responsible for such defects and cannot suffer by reason thereof; that no examiner of title can rely upon "any marginal note," but must examine the papers in the cases themselves; that it is nowhere alleged that the association or those who examined the records for it were misled by the failure of the clerk of the court to make additions to the docket and index book, and that there is no proof of such misleading; and in failing to take into consideration the state of the face of the docket, the special index thereto, and the examination of the general index corresponding therewith, as tending to show good faith.

VIII.

In holding, in effect, that had actual knowledge of their adverse title been given to the association by the appellees at

any time after the execution of the deed of trust under which the money was expended, they would have imparted no information not already imputable to the association, through its "agent," as "the equivalent of full actual notice," and that the association, with knowledge so imputed, made in the deed of trust a contract with Bradshaw binding in equity; and, further, in holding that the deed of trust provided for advancing one-half of $20,000 "within a few days" after it was recorded.

IX.

In holding that the association was placed in the hands of a receiver by reason of this and other ill-advised loans, without any testimony whereon to support this conclusion and notwithstanding the undisputed evidence of the appellant receiver, to the effect that "the association had never had any trouble about an error in title" (R., 125); and, further, (R., 126 and 145) that the receivership was caused by an adverse decision of the Supreme Court of Mississippi (case of Sodolaski *vs.* N. S. B. & L. Association, 77 Miss., 155), holding in effect that the association's loans in Mississippi, amounting to nearly $250,000, could not be enforced, which doctrine was, after the receivership, reversed by the proper federal court.

X.

In holding, in effect, that the officers of the association accepted a "chain of title" grossly defective, showing no title whatever in Walter or Bradshaw, and that the chain was further defective in not showing that the grantors to Walter were the heirs of George Walker, the original grantee.

XI.

In holding that there was no legal duty on the part of the appellees to warn the association against the consequences

of its own action and the fraud perpetrated upon it by its own agents; and, further, that the course pursued by the association was improvident and inconsiderate.

XII.

In holding, in effect, that the positive averments in the answer in respect to alleged notice being given to Childs, a bricklayer, and in respect to an alleged offer of compromise, except in so far as the same constitute admissions of knowledge and the equities charged in the bill, can be accepted as proof on behalf of the appellees in the absence of any testimony in support thereof.

XIII.

In holding, in effect, as true the *unproven* averment in said answer to the effect that the appellees offered to sell to the association the property at the market value thereof, notwithstanding the fact that said averment is contradicted by the exhibit to said answer, on which said allegation is predicated, purporting to be a copy of the letter constituting the alleged offer of compromise, and which alleged letter suggests "the price at which some lots (unimproved) in the same or contiguous square are *offered* for sale" (italics supplied), and notwithstanding the further fact that one of the appellees, Joseph R. Beardsley, was a minor.

XIV.

In holding that the members of the local board were agents of the New South Building and Loan Association.

XV.

In holding that the knowledge of members of the local board engaged in fraudulent conduct against or perpetrating

a fraud upon the said New South Building and Loan Association was notice to the association.

XVI.

In holding that "the entries on the records of the court" * * * "would have informed any intelligent inquirer of the existence and condition of the suits," or that such "was obvious upon ordinary inspection."

XVII.

In holding that the dockets denominated "Legal Dockets," as distinguished from the general index prepared by the clerk, contained the necessary entries from which notice could be derived of the pendency of the ejectment suits against the land in question.

XVIII.

In holding that there was record notice of the existence and pendency of the ejectment suits at the time of the transaction involved herein.

XIX.

In imputing notice to the said association by reason of the former equity suit, brought by certain of the defendants against Walter and others, praying for an injunction, and which was dismissed for want of prosecution prior to the execution of the deed of trust herein.

XX.

In not affirmatively holding that the association, as an innocent purchaser in good faith, took a conveyance in trust

and supplied the funds with which the buildings were erected.

XXI.

In not holding that it was incumbent upon the appellees, after the showing made, to have explained their standing by and silence, and further to have made known all the knowledge actually acquired by them in respect to the improvements which they saw being erected on the land they claimed.

XXII.

In not holding, by reason of the knowledge which the appellees are shown to have had in respect to the erection of six permanent buildings on their land ostensibly by a person known by them to have been irresponsible, while they stood idly by, without giving or attempting to give notice to the corporation which they knew, or should have known, was supplying the funds with which the same were being erected, that the land of the appellees should, in equity and good conscience, be subject to a lien in favor of the appellant to the extent of the value of the improvements.

XXIII.

In not holding that the appellees, or persons through whom they claimed, should promptly upon the commencement of the buildings have notified the association of the true state of the title and of the pendency of their adverse claim.

XXIV.

In not directing a decree to the effect that the complainant was entitled to a lien upon the premises mentioned in the bill of complaint to the extent of the value of the improvements

placed thereon, and referring the cause to the auditor to state an account in accordance therewith between the parties to the cause.

XXV.

In not reversing the decree of the Supreme Court of the District of Columbia, dismissing the bill and the amendments thereto, and in not granting the prayers of the appellant.

ARGUMENT.

From the statement of the case and a perusal of the opinions of the two courts below, it will be seen that a misconception of the underlying principles of equity applicable to the questions involved misled the courts in respect to their power to grant any relief and caused them to bring into confusion what would seem to be a clear case for the interposition of a court of equity to grant the character of relief sought.

In the argument of the case all of the assignments of error will be treated under three subdivisions, namely:

First. The appellees, by standing by and acquiescing therein while the buildings were being erected on the property claimed by them with the funds of the association, advanced in good faith, are estopped to deny the right of the appellant to a lien on the property to the extent of the value of the improvements.

Second. The appellant, as receiver of the New South Building and Loan Association, occupies the position of a *bona fide* purchaser for value and without notice and cannot be deprived of protection in equity by the bad faith of Bradshaw, the grantor, or the fraud of the members of the local board who participated with him in fraud on the association.

Third. Without reference to the connivance and estoppel of the appellees, the appellant, as receiver of the New South Building and Loan Association, as an improver in good faith, is entitled in equity to a lien on the property to the extent of the value of the improvements bestowed with the funds of the association.

These propositions will be presented in the order of their statement.

I.

Equitable Estoppel.

The first, second, third, fourth, eleventh, twelfth, thirteenth, twenty-first, twenty-second, twenty-third, twenty-fourth, and twenty-fifth assignments of error are involved directly or indirectly in this first proposition.

The improvements herein, as alleged in the bill (R., 10) and proven by the testimony, are a row of six brick houses, three stories in height, containing six rooms and bath each (R., 188), constituting Nos. 215 to 225 Ninth street N. E. and having a frontage of 16 feet each. The fronts of the buildings are pressed brick with stone trimmings. They rent for and now yield to the appellees, according to the testimony of their agent, Mr. Hough (R., 460), the sum of $20.50 per month each, or a sum of $1,476 per year.

Previous to the construction of the houses the land was vacant and yielded nothing, not even the taxes (R., 474).

As admitted in the answer (R., 34), the funds with which the buildings were erected came from and were supplied by the association. This fact is also shown by the testimony.

The accumulation of materials and the excavations for the foundations of this row of houses was actual and early notice to the defendants of the extensive nature and cost of the improvements.

The first money was payable from the association when the first-floor joints were laid (R., 316) and this had been duly certified, etc.

The alertness of the defendants is shown throughout the record.

As was well known by the appellees, the only proprietary title to this land was the Walker title of record. Since 1804 down to and including the date of the recording of the trust herein, there were no conveyances under such proprietary title pertaining to this land save and except those through which the deed of trust came of record (R., 174). The genuineness of the heirship to George Walker of the persons through whom such conveyances were made was regarded as having been substantiated and the title was considered by the title insurance companies of the District of Columbia as complete in this particular (R., 160 and 170). At the time this loan was made it was generally understood and believed in legal circles (R., 196) that the old George Walker proprietary title had been perfected.

For some four or five years this property had been in the actual possession of persons claiming under the Walker title.

The claims of the defendants to most, if not all, of the land were founded upon tax titles, as averred by the appellees in their answer. In addition to this weakness in their record claims to the land, the conveyances through which they claimed were based upon the numberings of lots on the original plats which appeared only in pencil form, while the persons claiming through the Walker title had followed the descriptions in ink form. Said numbers, as designated on plat of square 939 (R., 370), the pencil numbering being in red ink and the ink numbering in black ink, are fully discussed by the Court of Appeals in the case of Nehemiah B. Ashley *vs.* Aaron Bradshaw (14 App., p. 485).

So strong was the *prima facie* record showing under the Walker title that the appellees, in a suit instituted for the

purpose on March 1, 1890 (R., 422), were unable to restrain the persons claiming thereunder from dealing with the land through the records of the court as their own (R., 421); nor were they able to acquire a decree quieting the title of the appellees thereto. As averred by the appellees therein (R., 427), they knew that Aaron Bradshaw had "no property, real or personal," and charged under oath "the irresponsibility pecuniarily of Walter, Bradshaw," etc.

The evidence in this case abundantly shows that when, in 1890, Bradshaw and Walter (R., 431 to 434) constructed a small worthless building on the southwest corner of square 939, on the lot contiguous to the part of the land in question, the appellees, or the parties through whom they claim, were most aggressive in the assertion of their claim and made vigorous protests against the erection of such building. In addition to all this, the appellees, or the parties through whom they claim, knew as a matter of fact that the proprietary title, up to the date of recording the trust, stood in the name of one Lydia Hoagland and not in the name of Bradshaw, the person against whom their ejectment suits were so amended in March, 1893, as to include the land in controversy.

So apprehensive were the appellees, or parties through whom they claim, at the time with respect to the assertion of adverse claims that James A. Ashley, an attorney and practitioner in the Patent Office, and residing at 38 C street N. E., Washington, D. C., only a few squares away, had been constituted as the attorney-in-fact of all of the parties entitled to possession and also acted as the next friend for appellee Joseph R. Beardsley (R., 43).

So alert were the appellees and their counsel to defend title to the land that they took notice of the *building permit* issued by the District authorities in advance of the erection of the house on the corner, as stated, and attached a copy thereof to their said bill of complaint (R., 430*b*).

The first payment was made by the association herein

about November 29, 1893, in pursuance of the provisions of the deed of trust. The following facts and circumstances came under the eyes or within ready reach of appellee James A. Ashley, for himself and as representative of the others, which showed in advance of the first payment the purpose and extent of the improvement to be erected with the money of the association. On October 30, 1893, was recorded the following instruments:

(1) Release from John T. Arms and Samuel Drury, trustees, to Lydia Hoagland (R., 385); (2) deed from Lydia Hoagland to Leta M. Moss (R., 387); (3) deed from Leta M. Moss to Aaron Bradshaw (R., 390); (4) deed of trust from Aaron Bradshaw and wife to John H. Kennard and Johnston Armstrong, of New Orleans, Louisiana, trustees (R., 22), to secure the building association bond for $40,000 to secure an advance of *$20,000* from the New South Building and Loan Association of New Orleans, Louisiana; (5) recording of these instruments was published in the real estate and court record at the time (R., 420); (6) on November 20, 1893 (R., 383 and 384), there was applied for and issued to Aaron Bradshaw, by the building inspector of the District of Columbia, a permit to construct the six three-story brick buildings on the particular land described, said application (R. Print., 208) stating that the improvements were estimated to cost $24,000, and that *F. M. Angelo* was to be the builder; (7) there was the usual publication in the *Star* and *Post,* daily newspapers, at that time with respect to these proposed buildings (R., 216 and 217).

It is charged in the bill and not denied by the answer that the plaintiffs knew of the construction of these houses from the very beginning of the breaking of ground (R., 10, 14, 36). Before the first payment, the building had progressed to the laying of the first-floor joists (R., 316).

Mr. Thomas W. Smith, who supplied the lumber and whose place of business is First street and Indiana avenue N. W. (R., 249), by which Mr. Ashley in going to and from his

office passed (R., 251) and with whom Mr. Ashley had had a long acquaintance, noted the publication in the legal court record and knew at that time where the money came from with which the buildings were erected. No inquiry was made of Mr. Smith by owners.

Frank M. Angelo, the person mentioned as builder in the application for building permit, knew where the money was coming from with which the houses were being constructed, had to sign the certificates, was on the grounds where the buildings were being erected almost constantly and supervised the woodwork, but no inquiry was made of him by the owners (R., 241).

Mr. Stockstill, who supplied other materials for the building (R., 224), had no difficulty in ascertaining where the money came from with which the houses were being constructed (R., 226). The only person whom, it is claimed by the defendants, they notified was a Mr. Childs, shown by the testimony of his nephew to have been a poor old man, notoriously without means (R., 297). As suggested before, the appellees did not place James A. Ashley on the stand or explain or attempt to explain the reason for the silence of the appellees, or the persons through whom they claimed, or to deny the allegations of the bill to the effect that they knew of the erection of the buildings from the very beginning until their completion, and stood by in silence, under all these circumstances, while the same were being erected. They do not explain to what extent, if at all, they made inquiries or why they failed to pursue the knowledge they had actually received, and how it was that they could state in their answer that they did not know the full claims of the association until after their buildings were completed.

Their answer admits and ratifies the action on the part of Mr. Henry F. Beardsley in admitting in their behalf the equities of the association by reason of the improvements "under the peculiar circumstances of the case" (R., 45), and that appellees' interests should be treated on the basis of

"unimproved" land. (See Exhibit B to joint answers, R., 45.)

From these facts it is clearly shown, and appears not to be disputed, that the appellees, or the persons under whom they claim, were not only cognizant of the fact of the commencement and erection of the substantial improvements by some one claiming under the proprietary title and actual possession of Bradshaw, but also that the appellees had actual knowledge or knowledge sufficient to have readily discerned the party which was being defrauded. If the details of the advance were not actually acquired by the appellees, it was evidently a part of the fraud perpetrated by them in closing their eyes to the evidences pressed upon them; and this is made conclusive by their attitude in urging the defense that they are not "to act as guardian for the building association," and closing their lips as to the actual knowledge they acquired, while inequitably contending, through their counsel, for the fruits acquired by their standing by at the expense of the improver in good faith.

In view of the fraud practiced upon the association by Bradshaw and his co-conspirators, the Supreme Court of the District of Columbia erred in assuming that there was a contractual relation involved between Bradshaw and the association upon the execution of the deed of trust which would have prevented the association from withholding the advances made as the buildings progressed for five or six months thereafter. These facts and circumstances, as will be more fully hereinafter discussed, were such, as between the association and Bradshaw, as to have rendered invalid and illegal the arrangement, and it is grave error to suggest that Bradshaw had any right in equity or law to have enforced the making of advancements in the light of such fraud. The officer of the association in whose custody the checks were retained, and from whom alone they could be received for delivery as the buildings progressed, clearly stated while on the stand (R., 123) that it was within the power of the

association to have stopped such payments at any stage in the progress of the buildings, and that if he had had any idea of the fraud being perpetrated or of a defect in the title, the perfection of which Bradshaw had under oath averred in advance and as a condition precedent in the acquirement of any sum (R., 337), the checks would have been stopped and no advances whatsoever would have been made.

The eighth assignment of error calls attention to a further error on the part of the same court, in this connection, "in holding that the deed of trust provided for advancing one-half of the $20,000 'within a few days' after it was recorded." There is no such provision in the deed of trust. The documentary evidence shows that the advances were to be made as the buildings progressed (R., 316). This was corroborated (R., 119) and not disputed. The check for the first payment of $4,000 was not turned over until a few days after November 17, 1893 (R., 182). The next installment of $3,000 was delivered about December 23, 1893, and the third installment, of $4,000, about January 22, 1894; the fourth, of $2,000, about February 21, 1894, and the last, for $7,000, not until April 12, 1894 (R., 4).

From a careful perusal of the opinions of the courts below, it would seem that they wholly overlooked and utterly disregarded the effects of the frauds practiced on the association by Bradshaw, Walter, and others, both as the same have a bearing upon the rights and relations of the association to and with them and also as they reveal the good faith of the association in the transaction. For instance, in discussing the obligations of the appellees to give notice, Mr. Justice Hagner speaks as though notice to the *"aggressors"* might have been proper to have been made sooner. The equitable doctrine, sought to be applied in this case, is not as between the appellees and Bradshaw, but between them and the building association, fraudulently induced by Bradshaw to make advances and fraudulently permitted by the

appellees, or the persons through whom they claim, to make expenditures which at the time they knew could not have been and were not being supplied by Bradshaw, but by some other party of whose identity the opinion of the Supreme Court of the District of Columbia, concurred in by the Court of Appeals, concedes that the appellees or the persons through whom they claim had constructive if not actual knowledge.

Equitable Estoppel—Authorities.

Anderson *vs.* Reid, 14 D. C. Appeals, p. 76. The occupant in good faith can maintain a bill in equity against the true and lawful owner for the value of his improvements "where there has been fraud, or something in the nature of fraudulent inducement, on the part of the true owner whereby the occupant in good faith has been misled to his detriment." The court cites with approval in this case (p. 73) Story's Equity Jurisprudence (secs. 1237, 1238). "So, if the true owner stand by and suffers improvements to be made on an estate without notice of his title, he will not be permitted in equity to enrich himself by the loss of another, but the improvements will constitute a lien on the estate. In all cases of this sort, however, the doctrine proceeds upon the ground * * * that there is some fraud."

The principle is stated as follows (Beach Eq., vol. 2, 1107):

"If a stranger begins to build on the land of another, supposing it to be his own, and the owner abstains from setting him right and leaves him to persevere in his error, a court of equity will not allow the owner afterwards to assert his title to the land on which the other person had expended money, supposing that the land was his own. The court considers that when he saw the mistake into which the other person had fallen, it was his duty to be *active* and state his adverse title; *and that it would be dishonest in the owner to remain wilfully passive* on such an occasion *in order afterwards to profit* by the mistake which he might have prevented. But to raise such an equity two things are required: first, that the

person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner."

Kingman *vs.* Graham, 51 Wis. 248-249.

"When, however, the owner is directly apprised of the ignorance of the buyer, and of his purpose to act in such ignorance, he cannot claim the benefit of the principle (exemption from estoppel because (*a*) Not a party to the immediate transaction, (*b*) Title duly recorded), because good faith requires him to speak."

"The duty to speak rests *upon the knowledge that another is about to act in ignorance of the truth*" (*id.*).

"Of course, contact or presence of the party to be estopped is not necessary; there may still be a duty to speak."

Bigelow on Estop., 596.

"The term 'standing by' so often used in the books and reports in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but it means silence when there is knowledge and a duty to make a disclosure."

Anderson *vs.* Hubble, 93 Ind., 573.

The case of Sumner *vs.* Seaton, 47 N. J. Equity, 103, is a very full and able discussion of the authorities bearing on the principle. In this case the error as to title on the part of the person improving was held to have been made in good faith, the complication arising from a change in the line of a street by municipal authorities which left the improver without front to a valuable property. The effect of record notice is discussed (p. 112) and cases distinguished (p. 113-118).

At page 119 the court says:

"In the case in hand I find it impossible to suppose that the defendant did not understand that the complainant was making her improvements in the complete confidence that she had title to the whole of her lot. It would have been an

act of the greatest folly, if not outright insanity, in her to have made the improvements if she had supposed any other person owned the strip in question. The transaction spoke for itself, and, as before remarked, there was no pretense at the hearing that the defendant did not so understand."

The Supreme Court says in Morgan *vs.* Railroad Co., 96 U. S., 720:

"The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim that he seeks to enforce in this litigation. The principle is an ~~un~~important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent (The Bank of U. S. *vs.* Lee, 13 Pet., 107). He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who had acted accordingly on that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage."

The rule is otherwise expressed: *"Qui tacet, consentire videtur; qui potest et debet vetare, jubet si not vetat"* (47 N. J. Eq., 111; 10th Md., 317).

In the case of Hoffman *vs.* Smith, 1 Md., 491, it was held that one who stands by and sees innocent parties lay out money and make improvements to which he himself has some claim or title which is unknown to the other parties and he does not give notice of it, he cannot afterwards in equity and good conscience enforce such a claim. The principle was not applicable in that case, because the parties claiming protection from the suggested estoppel were parties to the deed, a right under which they sought to estop, and the im-

provements were made with full knowledge of the adverse right under the deed.

In the case of Bryndon *vs.* Campbell, 40 Md., 331, the estoppel was maintained, the court holding that the improver was without knowledge of the true owner's title, and that the latter saw that extensive construction was going on, "but did not inform Bryndon (improver) that he had any claim of title. This course of proceeding on the part of Governeur, Jr. (true owner), was not consistent with good faith or fair dealing. Courts of equity hold a party estoppel by his silence and acquiescence under such circumstances" (pp. 338, 339). This case is elsewhere cited herein as to defect in record. It was held that the "notice can only be of the record disclosed" (p. 337).

In McIntire *vs.* Pryor (10 D. C. Appeals, 440) was considered a claim for the benefit of improvements as against rents and profits. What constitutes good faith was discussed and authorities considered (p. 441) and the improvements allowed, although the improver had secured what he believed to be good title to the property "by gross fraud upon the complainant, which she was entitled to have redressed in a court of equity" (p. 442). The complainant was guilty of delay in the assertion of her right "such as to give sanction to the improvement of the property by the defendants." * * * "It is claimed that she made some protest against the construction of the improvements in question; but the proof on that point is rather vague. She is, it is true, a poor, ignorant colored woman, unacquainted with her rights under the law, and equally unacquainted with the law's requirements, and the consideration of that fact was potent in our determination of the fraud that was practiced upon her. But we are not justified by such consideration in sanctioning the punishment of the defendants by the confiscation of that which they placed upon the land when they were the apparent owners under an apparently good record title, and which it is not controverted beneficently enhances the value

of the property to the full extent of the value of such improvements. It does not seem to us to be a case proper for such punishment of the defendants" (p. 442).

These authorities, considered in connection with the facts and circumstances of the case, conclusively sustain the contention of the appellant, that the appellees are estopped to deny the right of the appellant to the equitable lien sought.

Notwithstanding these equitable principles and the remarkable conduct of the appellees, the Court of Appeals holds, as pointed out in the second assignment of error, that the appellees' *"conduct throughout appears to have been fair and reasonable."* (Italics supplied.)

It is a matter of conjecture how chancellors of so great distinction could have indulged in such an expression of endorsement of the course pursued by the appellees in the premises, but, after careful consideration of the opinion, the conclusion has been reached that certain matters of defense, which it was error of law to consider, influenced and controlled the mind of the court in this regard, and that the court erred:

In considering (*a*) the unproven affirmative averment of the joint answer to the effect that an offer to sell was made to the association contained in an alleged letter from Mr. H. F. Beardsley to Messrs. Acker and Miller, dated May 31, 1895 (see Exhibit B to joint answer, R., 44); and, further, in holding (*b*) that it was incumbent upon the association to have accepted the same.

To sustain the first proposition (*a*) requires no argument. But, assuming for the sake of the argument, and not otherwise, that the alleged copy of the letter of Mr. Beardsley must be taken as proven, is there anything definite in the price? With one of the appellees, Joseph R. Beardsley, a minor, could a conveyance have been made of the entire title of the appellees? The alleged communication shows on its face "that no delegated authority to act had been given by the association." The president and general counsel and as-

sistant general counsel of the association and Mr. Acker were all on the stand; but there was no effort made to show that the alleged letter had ever been delivered.

It is contended by counsel for the appellees that when the power of attorney (R., 349) was executed by Bradshaw in favor of Acker, dated September 18, 1894, which was recorded October 31, 1894, that the association became committed and bound by agreement to aid and co-operate with Bradshaw in the defense of the title under which the association held. If this is true, and is a proper construction of the power of attorney appearing of record, how could they have expected the alleged indefinite offer, to sell at the price unimproved lands in the vicinity were being *"offered"* (not sold), to have been accepted? And what basis is there for any belief in Mr. Beardsley's good faith in making such alleged offer?

Considering the apparently flimsy nature of the appellees' claim, as it then appeared to be, how could the officers of the association have justified their action in paying such a price for the property at that time?

Inasmuch as the large and more valuable part of the land involved in the ejectment suits would have been left in a state of litigation and the same proceedings would have gone on, even if all of the appellees had been in position to sell and the association had purchased their interests in the land involved herein, how have the appellees suffered by its not having purchased?

But the second (*b*) proposition, under argument, is equally untenable.

In the case of Searl *vs.* School District (133 U. S., 553), similar to the case at bar except that the School District knew of the claims of Searl under a United States patent and had been warned against the erection of its improvements on the land about to be recovered by Searl in an ejectment case in which the School District had pleaded, the case being at

issue and set for trial (p. 557), this court, speaking through the Chief Justice, said:

"Although it (School District) may have been wholly mistaken, *the intention guided the entry and fixed its character*, and it can not be held to have been such a trespass as to justify the claim that the school building, erected in similar good faith, so became part and parcel of land as to entitle the owner (a defendant) to recover its value * * * and no notice of what his grantor or himself intended to insist on *could destroy the good faith in fact.*" (Italics supplied.)

When the association accepted the deed of trust in good faith and in good faith made the advances with which the buildings were erected, especially while the appellees stood by and saw it do so without protest, the *"character"* of its "entry" and its rights became fixed, and the appellees cannot relieve themselves of the association's right first to defend or await the defense of the title it purchased at law and then to seek and obtain the aid of a court of equity to declare its lien.

In concluding the argument of the first proposition laid down in this brief, namely, right of appellant to relief on the ground of equitable estoppel, it is deemed proper to say:

First. That the practical admission of actual knowledge by appellees of the erection of substantial buildings on their property requiring funds which they knew Bradshaw could not supply without defrauding some one to advance the same made it incumbent upon them to be active, perform the easy task of finding out who was being defrauded, and notify such party, or else, in equity and good conscience, to suffer the imposition of a lien to the extent of the value of the improvements so bestowed in good faith by the association. And it is not enough for the appellees to deny full knowledge of all of the facts they might easily have learned; and the failure on their part to place appellee James A. Ashley, the local representative of all of them, on the stand and explain

what he did know and why he closed his eyes to fuller knowledge, is a circumstance which confirms the strong circumstantial evidence of the fraud practiced by the appellees in the premises.

Second. The defense, set up in the answer, an alleged willingness to sell to the association as unimproved property, extra costs, etc., which, while an admission of the equitable rights of the appellant, was not proven, and, if proven, could not prevent the equitable relief craved.

II.

Good Faith.

The appellant, as receiver of the New South Building and Loan Association, occupies the position of a *bona fide* purchaser for value and without notice, and cannot be deprived of protection in equity by the bad faith of Bradshaw, the grantor, or the fraud of the members of the local board who participated with him in frauds on the association.

At the outset of this branch of the argument, it is deemed proper to state certain facts of record which cannot be disputed.

1. That the grantee association, in the ordinary and usual course of its business under its by-laws, secured the examination and report on the title by the proper attorneys and received advice of counsel to the effect that the title was good and that there were no pending suits involving the property.

2. That neither the board of directors and general officers of the association nor any person representing the association in Washington not parties to the gross fraud, found by the courts below to have been perpetrated against it, were cognizant of the fact that ejectment suits were pending.

3. That all of the last-mentioned parties actually and honestly believed that the title to the property in question was good in Aaron Bradshaw, subject only to the deed of trust in favor of the association, before a single dollar was advanced under the trust.

4. That they had no actual knowledge of the fact that Bradshaw was otherwise than in rightful possession of the property or cognizant of the facts pertaining to his acquirement of possession until all of the money had been actually advanced.

5. That the association and its officers and agents, not parties to the fraud, remained in ignorance of the pendency of said suits and defects in title until after all of the $20,000.00 secured by the deed of trust was advanced and the buildings had been completed.

6. That the buildings erected on the property of the appellees were actually constructed with the funds, so advanced, by the association.

7. That, at the time of the transaction, the line of title under which Bradshaw held was the only proprietary title and the same was regarded by the best title companies in this city as a good record title.

8. That the same was also regarded by such companies as a good marketable title when united with actual presumably lawful possession.

9. That no question has been raised against the high standing, character and professional attainments of Mr. Walter H. Acker, who made the final certificate as to the title, or his good faith in making such certificate.

10. That Mr. Acker examined the general numerical index to ejectment suits, prepared by the clerk at public expense and kept by him for the use of himself and the public, which purported to show all of the lands in the particular square in question that were then involved in ejectment suits; that the same corresponded with the numerical entries on the face of the docket in each ejectment case pending; that it also corresponded with the numerical docket index purporting to show all of the land involved in ejectment suits entered in the particular docket embracing the pending ejectment suits involved; that the land involved herein, brought into ejectment by amendments filed in March, 1893, was not numerically noted, according to custom, on the face of the docket, the docket index or the appropriate general index and was, therefore, not discovered by Mr. Acker as being involved in ejectment and not reported to the association, as would otherwise have been done, notwithstanding the fact that said amendments were made during the period covered by the report of Aughinbaugh.

11. That it is not held by either of the courts below that the association, with actual knowledge of the infirmities of the title, acted in bad faith; but, rather, that the infirmity itself and the knowledge of those actively participating in the fraud, were such that, when imputed to the appellant, they constitute him, in contemplation of law, the equivalent of a holder in bad faith.

It is proposed, in the argument of this branch of the case, to show that, but for the errors of law made by the courts below, the conclusion should have been reached that the association was an improver in good faith.

The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nine-

teenth, and twentieth assignments of error are involved directly or indirectly in this second proposition.

The errors of the courts below on this phase of the subject may be treated in the main under the following heads:

(*a*) In imputing to the association knowledge of members of local board who were parties to or actually participated in the fraud against the association.

(*b*) In imputing to the association knowledge of the averments of a dismissed equity suit, which did not constitute a *lis pendens*.

(*c*) In imputing knowledge of the pendency of ejectment suits and finding that the defects in the court records and fraud did not relieve against or excuse lack of actual knowledge.

(*d*) In concluding, as an equitable doctrine, that the bad faith of the grantor, Bradshaw, passed by conveyance merely and must be imputed to the innocent grantee.

It is deemed proper, in the outset of the argument, to call attention to certain authorities defining good faith, as applied to cases involving claims to land or improvements on lands of another.

In the leading case of Woodward *vs.* Blanchard (16 Illinois, 432), accepted as authority by this court, it was expressly held that, in arriving at a conclusion with regard to the knowledge of a person claiming to act in good faith in respect to land claimed, such person will not be held responsible by "*imputing*" knowledge, but the knowledge must be actual. The court, page 432, said:

"The policies of the law will not receive actual ignorance of it, as an excuse or defense in doing acts denounced by it as *criminal*, but will impute a knowledge of it to every man, and hold him accountable accordingly. And this is a policy

that can not be altered by actual ignorance in fact, although every one who hears the facts may be compelled to believe the party ignorant. And the party is as definitely concluded from denying the intents and motives resulting from this imputed knowledge, as he is in denying the fact of knowledge. These principles do not apply universally, nor in their inflexible *strictness, to questions of property or title.*" (Italics ours.)

In the case Searl *vs.* School District No. 2 in Lake County (133 U. S., 553), the School District, with full knowledge of the fact that the defendant held under the only United States patent which had been granted, purchased a squatter claim and proceeded to erect the improvements against the expressed notice and protests of the owner under said patent, and this court held that the School District acted in good faith and was entitled to relief against the successful claimant (under whose patent title was admitted and was about to be sustained in an ejectment action to which the School District was a party), to the extent of the value of the improvements.

The court said:

"Though the district had knowledge of the issuing of a patent covering the property, yet it purchased the adverse title of the party *then in possession*, believing it to be better than the patent title, and upon the advice of reputable counsel, who had, on investigation, reported against the validity of the title purchased, * * * ; and that, notwithstanding notice that it was proceeding at its peril, it erected the building in reliance upon such belief that it had the better title. The only legitimate inference from these facts is that the district acted throughout in good faith, as the opposite of fraud and bad faith, and, although it may have been wholly mistaken, the intention guided the entry and fixed its character, and it can not be held to have been such a trespasser as to justify the claim that the school building erected in similar good faith, so became part and parcel of the land as to entitle the owner (a defendant) to recover its value."

In stating the principles and authorities on which it arrived at the conclusion that the district acted in good faith, this court further said (133 U. S., p. 563):

"In *Wright vs. Mattison*, 18 How., 50, this court, in considering a statute of the State of Illinois in protection of persons 'in the actual possession of lands or tenements under claim and color of title made on good faith,' reiterated the rule that color of the title is matter of law, but good faith in the party claiming under such color is purely a question of fact; and held that, while defects in the title might not be urged against it as destroying color, they might have an important and legitimate influence in showing a want of confidence and good faith in the mind of the vendee, if they were known to him, and he therefore believed the title to be fraudulent and void. The court approved of the opinion of the Supreme Court of Illinois in *Woodward vs. Blanchard*, 16 Illinois, 424, in which it was said by Scates, C. J., that 'the state of mind of the party in relation to such title was an existing truth which must be ascertained and found as a fact in the cause. Many independent facts and surrounding circumstances may be admissible in evidence, and legitimately considered as establishing or impeaching the state of mind in its good faith, honest belief or trust in, or dependence upon such title.' And this language was quoted by the court from that opinion: 'Good faith is doubtless used here in its popular sense, as the actual, existing state of the mind; whether so from ignorance, scepticism, sophistry, delusion, fanaticism, or imbecility, and without regard to what it should be from given legal standards of law or reason' (*Ewing vs. Burnet*, 11 Pet., 41; *Pillow vs. Roberts*, 13 How., 472). As remarked by Beckwith, J., in *McCagg vs. Heacock*, 34 Illinois, 476–479: 'The good faith required by the statute, in the creation or acquisition of color of title, is a freedom from a design to defraud the person having the better title;' and 'the knowledge of an adverse claim to, or lien upon property, does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien.'"

In the light of these authorities, it is observed that good faith, as applicable to the case at bar, must be considered

and determined upon the broad common-sense idea of actual knowledge and positive intent to perpetrate a wrong upon the true owner.

Before discussing the errors of law of the courts below, it is proper to state the precautions taken by the association before accepting the title and making the advances.

Precautions as to Title.

The first application for loan, as presented through the local board in due course of business, under date of June 20, 1893, was accompanied by the certificate of W. E. Aughinbaugh, attorney for local board, to the company, dated May 26, 1893 (R., 327).

There was attached to this certificate a chain of title made by the Real Estate Title Insurance Company of the District of Columbia (R., 319), regular in form (R., 168) as issued, and purporting to give all record transfers from October 13, 1792, down to and including June 2, 1893, between which dates there was nothing to indicate the dates of instruments recorded, the liber and folio only being given in the usual form.

The opinion of Aughinbaugh, similar in every particular to a like report on the same title rendered by Mr. M. Ashford, president of said Real Estate Title Insurance Company, under date of September 16, 1892 (R., 364, 365, and 160), passed in a reasonable way upon the questions presented and concluded that the title was "good according to the record in Lydia Hoagland," subject to a certain deed of trust from said Lydia Hoagland to John T. Arms and Samuel Dreury, securing $10,176, dated September 14, 1892, which, according to the correspondence, was to have been and was released.

With respect to the equity cause, as brought by the Ashleys for an injunction, etc., on March 1, 1890 (for docket entries see R., 421), in which no testimony had been taken

and motion had been made to dismiss, Aughinbaugh said (R., 327):

"Although the record shows absolutely no title to caption in Joseph R. Ashley when living, or in his heirs when dead, yet in March, 1890, the latter instituted proceedings in equity (cause 12318) against John H. Walter, whose title is now vested in said Hoagland, claiming to be the owners of said property. This proceedings is still pending, but the docket shows an undisposed of motion made by the defendants to dismiss for failure to prosecute. I regard this suit as of no vital importance. *It will undoubtedly be dismissed by the court.*" (Italics ours.)

It is to be noted from the report of Aughinbaugh (R., 327) as well as the opinion of Mr. Ashford (R., 160), the name of Bradshaw was not mentioned in connection with the equity suit.

In due course of business this first application of Bradshaw, as accompanied by said papers, was taken up for consideration by the proper officers of the association at New Orleans, and rejected, among other reasons, because "the association never considered applications when there was any cloud on the title of any kind" (R., 91), and, although neither the general counsel nor any officers of the company knew the allegations of said bill in equity (R., 91 and 128), the loan was not allowed, nor would it have been in the absence of the dismissal of the suit (R., 92), and the loan was never made herein until after that suit had been dismissed and the proper final certificate had been signed by Mr. Acker (R., 335).

As seen, the report of Aughinbaugh on the title herein failed to show the pendency of the ejectment suits as against the land in controversy, as had been made to apply by amendments offered in March, 1893, some months prior to the date of his certificate. There is nothing in the record to show that he knew of the pendency of these suits, and the bill of complaint herein was prepared and filed before the

discovery by the appellant of the fact that there was an error on the records of the clerk of the court with respect to such ejectment suits (R., 52), which defect was promptly averred by amendment to the bill (R., 50).

As anticipated by Aughinbaugh in his report, and in confirmation of the opinion both of Aughinbaugh and Mr. Ashford as to the merits of the equity suit, the same was dismissed for want of prosecution on July 1, 1893, and Bradshaw proceeded to renew his application for a loan, reducing the amount sought and the number of lots involved therein. The certificate of the loan committee of the local board, (R., 311), of which the architect was a member, was most complimentary to Bradshaw and there was every indication that the loan was a desirable one, as will be hereinafter more particularly discussed. In the meantime Aughinbaugh had ceased to be counsel of the local board, and Mr. Walter H. Acker had been chosen in his place.

In support of the renewed application, there was forwarded to the association the District Title Insurance Company's continuation of title (R., 330, 332), dated September 23, 1893, and covering a period from June 1 to September 23, 1893, inclusive. This continuation showed the dismissal of the equity suit on July 1, 1893, but failed to make any reference whatever to the pendency of any ejectment suits, which, as contended above, would have been discovered by the Title Company when examining the numerical records pertaining to square 939 but for mistakes in those records with respect to the land in controversy, as brought in by amendments.

Instructions (R., 315) were then given and were received by Mr. Walter H. Acker, a most reputable attorney of the bar, with respect to the precautions required by the association on the subject of title in advance of the making of any payment whatsoever. As stated in the testimony of Mr. John H. Kennard, at the time of the loan, president and general counsel of the association (R., 92), the instructions "were

clear and explicit to the effect that an invariable requirement for the completion of a loan was a title clear and free from all incumbrances in the borrower at all times during the transaction." See Exhibit No. 2 (R., 313), Exhibit No. 3 (R., 315), and the first and *final* certificate required to be made to the abstract of title (R., 335).

This final certificate as signed by Mr. Acker, under date of November 1, 1893, and forwarded to the company contained, among other things, the following statement:

"That there are no proceedings commenced in the State or United States courts which affect this land * * * and that in my opinion the title is good and valid in fee simple in Aaron Bradshaw. * * * subject only to the trust deed of the New South Building and Loan Association, of New Orleans, Louisiana, which is described in the abstract to which this certificate is attached."

This certificate was relied on in making the loan (R., 104). This certificate was made by Mr. Acker, after the examination of the index to ejectment suits, which index, if correct, would have shown this land to be involved and would have referred to the particular suits that are omitted alike from the reports of Aughinbaugh, by the District Title Insurance Company, and by Mr. Acker.

This certificate from Mr. Acker was also made and communicated to the association after the inquiry contained in the letter from the association dated October 23, 1893 (R., 317), with respect to the dismissed equity suit for the want of prosecution without prejudice.

At the time Mr. Acker took up this matter for disposition, in addition to the equity suit being dismissed (R., 332), the docket of the court (R., 421) showed that long before the case was dismissed, on July 1, 1893, its prosecution had been abandoned and no steps whatever had been taken therein on the part of the plaintiffs since 1890, the year it was filed. It was not necessary for him to do so, and the bill of complaint and other such original papers were not read by Mr. Acker (R., 213).

Instructions and Information before Advances.

The association was not only careful with regard to the matter of title, but the precautions with respect to each step, from the beginning to the close of the transaction, were of a character far more cautious and painstaking than are ordinarily used by those who lend money. As hereinafter shown, they could alone have been circumvented by fraud of a positive character.

(1) The application required (R., 305) answers to numerous questions and had to be sworn to; (2) the certificate and report of the local board appraisers (R., 311), likewise under oath, was also complete and strong, both as to the personnel of the applicant and the desirability of the loan; (3) the land was also examined and appraised by persons known to the Association and independently of local board (R., 129 and 136); (4) the loan committee at New Orleans scaled down the amount of renewed application four thousand dollars (R., 312) and required, in addition, a like amount to be expended in improvements or materials in advance of first payment; (5) the mode of payment was so modified as to reserve $7,000 until after the buildings had been completed (R., 314); (6) the instructions contained in letter (R., 315) and loan slips (R., 313 and 314) enclosed, as delivered to and carefully followed by Mr. Acker, were both minute and comprehensive; (7) the blanks supplied, and which had to be and were filled out under oath before each payment were most complete—see Complainant's Exhibits 6 (R., 337 to 341, and 245); also Exhibit 7, "Affidavit of contractor" as to cost of building (R., 343); (8) bond against mechanics' liens (R., 354); (9) agreement as to taxes; (10) agreement as to insurance; (11) release of mechanics' lien, with certificate of "contractor" thereto.

In addition to the certificate, etc., and the report of the architect before each payment, Mr. Acker went in person to

and saw that the houses had progressed to the requisite stages (R., 178). Meanwhile the checks were held by the proper officer of the company and were not allowed to be turned over until all of the proper certificates were had and the prerequisites had been accurately and fully complied with.

It is not and cannot be claimed that the New South Building and Loan Association, or any agent thereof, not party to the fraud against it, had actual knowledge of adverse possession or title or had any intent to prepetrate a wrong upon the appellees.

Errors of Courts Below.

The misconception of the Court of Appeals involved in the ninth assignment of error is sufficiently met by the references to the record noted in the assignment itself.

The tenth assignment of error is also based upon a misconception on the part of the Court of Appeals. At the time the chain of title was made, dated June 2, 1893 (R., 326), nearly five months before the loan was allowed to Bradshaw, it was clearly understood that the legal title stood in Lydia Hoagland, as was reported by Aughinbaugh (R., 328). Before the loan was granted, the chain was continued by Mr. Acker to and including the conveyance to Bradshaw (R., 324).

The court seems to be laboring under the impression that a chain of title, giving the names of the grantors and place of record of deed, is defective if such chain fails to set forth the relationship of such grantors to the ancestor under whom they claim. Such relationship, whether specified in the deed (*and thus alone forming the basis for a descriptive reference in the chain*) or not, are matters ordinarily alone covered by the certificate of title, and was so covered in the certificate of Aughinbaugh (R., 327).

The answer of the appellee (R., print 18) admits that the

grantors to Walter were "persons claiming to be the heirs of one George Walker."

The certificate of title of the Real Estate Title Insurance Company of September 16, 1892 (R., 365), shows that this company was satisfied on the subject of heirship of these grantors. The same was true, at the time, with the Columbia Title Insurance Company. (See testimony of its secretary, R., 169, 173, 174.)

While the conveyance to which the court refers was made prior to and was embraced in Aughinbaugh's certificate, Mr. Acker, who made the continuation and final certificate, also understood that the grantors to Walter were all of the heirs of George Walker, the original owner (R., print 111). Indeed, there is nothing to show that such was not the case, except that the defendants in ejectment would seem not to have affirmatively proven the fact.

Errors Below in Imputing Knowledge.

The errors of the courts below, denominated (*a*), (*b*), and (*c*) above, are here discussed in their order.

(*a*) In imputing to the association knowledge of members of local board who were parties to or actually participated in the fraud against the association.

Certain members of the local board were guilty of fraud against the association, and the courts below so found. The following are the circumstances, in the main:

The New South Building and Loan Association belonged to that class commonly known as "national associations," and was organized under the laws of the State of Louisiana. As seen from the by-laws (R., 76), the corporation was managed and directed by its board of directors and officers, who were all residents of the State of Louisiana. The local board, such as was organized in Washington, D. C., was simply an aggregation of stockholders, to whose interests, as stockholders, it would be to see that no imposition was had on the associa-

tion within their locality, such supervision on the part of the stockholders having long been a source of strength and advantage to local building associations. The local board had its own organization, chosen by resident stockholders, and voluntarily assumed the obligations incident to the administration of the affairs of such board, although neither they nor their officers were regarded as agents of the corporation of which they were stockholders. The local treasurer, for instance, was the treasurer of the local stockholders, not of the association, and the by-laws expressly provided that until the moneys were actually received by the treasurer of the corporation, fees paid by members of the local board to their own treasurer could not and would not be credited on the books of the corporation as paid (R., 80, sec. 4).

In the lawful plan of the organization of the association, it is undoubtedly true that the local board formed an important function, intended as a source of protection and an aid to safety in the conduct, from the home office in New Orleans, of a business of large proportions throughout the United States. In theory it was based upon the idea that the local stockholders would be interested in the successful operation of a corporation in which they were investors, and that therefore they would be as careful in the election of local boards, where they resided, which would be an aid to the corporation, as had been the case in the operation of local building associations.

Any stockholder, or even employee, of the corporation who would take part in choosing unreliable men as officers of such a local board and coöperate with them in the perpetration of fraud against the corporation must have been parties to the fraud.

Aside from the position of treasurer of the local board, the duties of president, architect, and attorney were quite important. Under the by-laws the latter examined and reported on the title to property on which loans were made, the fees therefor, as customary, to be supplied by the borrower.

Under these conditions John H. Walter, B. Stanley Simmons, and W. E. Aughinbaugh respectively were chosen by the local stockholders and accepted the positions of president, architect, and attorney for the local board.

While the record title to the land stood in Lydia Hoagland, an unrecorded deed thereto (R., 387) had been made to the clerk of Walter, Leta M. Moss (R., 134). Walter knew of the pendency of ejectment suits against this land and must have known that the association would not make advances thereon should it become cognizant of the pendency of such suits. There was undoubtedly placed in the hands of Aughinbaugh, what is shown to have been received by Mr. Acker (R., 244), a certificate of title, as signed by M. Ashford, president of the Real Estate Title Insurance Company (R., 364), and dated September 16, 1892, which was some months before the ejectment suits had been so amended as to apply to the land in controversy. The same was issued on the order of Walter (R., 155). Walter also procured from the Real Estate Title Insurance Company a chain (R., 319), according to his written order therefor (R., 154), "only as to fee." As testified to by Mr. John D. Coughlan, secretary of the Columbian Title Insurance Company (R., 168), this chain was regular in form and calculated to deceive, in that the same was confined to proprietary title.

With full knowledge of the defects in the title, Walter actively coöperated thus and otherwise in securing the loan from the association, signing each and every one of the certificates on which money was advanced (R., 338 to 343, inclusive), being present and coöperating, as testified to by his intimate and personal friend, F. M. Angelo, falsely held out by Bradshaw as the builder (R., 384), when Angelo demurred to and was finally induced by Bradshaw in the presence of Walter, in Walter's office, to sign certificates with respect to the correctness of which he did not know (R., 245); said Angelo, under such pressure, going to the

point of making an affidavit to the effect that he was contractor, and that the buildings had cost $24,000, when there was no contract with him except as to the woodwork and he was ignorant of the cost of the building. Angelo admitted on the stand (R., 239 to 247) that he did not tell the appellant thereof when interrogated by him just before (R., 245) the institution of this suit.

The local architect also signed all of these certificates (R., 338 to 342, inclusive), and wrote a letter to the association (R., 363), which formed and made an important link in the chain by means of which, together with the certificate signed by James T. Childs (R., 372), there was made to appear, and certified to by the architect and by Walter in the first certificate (R., 338) to be true, that the building materials to the extent of $3,030 had been purchased by Bradshaw and could properly form a part of the $4,000 required to be expended before the first advancement, when, as a matter of fact, the brick described in the receipt of Childs (R., 372) were a brick-kiln, purchased by Childs for a mere song (R., 299), and which had to be cleaned, hauled and placed on the premises before they could have anything like the intrinsic value certified to by the architect and by Walter.

Not only did Walter and Bradshaw conceal from the association their knowledge with respect to the defects in title, but Bradshaw, presumably in the office of Walter, and before Leta M. Moss, the notary there, made an affidavit, among other things saying:

"That said property is free and unencumbered with the exception of the deed of trust to the building association; that such deed of trust is the first lien against the property" (R., 337).

Instead of Angelo being a contractor, as he purports to be on all of the certificates (R., 338 to 343, inclusive), and instead of the certificate of Angelo as to costs of construction being correct and within the knowledge of Angelo, they were

incorrect and were not within the personal knowledge of Angelo, and Bradshaw knew and Walter must have known that the association was being ingeniously defrauded at every step in the progress of the building.

All of these frauds were such as that, notwithstanding the most careful system of checks and precautions of every kind and with the aid of an honest and conscientious man, in the person of Mr. Walter H. Acker, against whom from the beginning of this record to the end there is not one word of reflection and who exercised the extra precaution of going to and examining the buildings before each payment was made, notwithstanding the duty of the architect in the premises, the association was deceived and defrauded, both as to the state of the title and the actual cost of the buildings erected.

The connection of Aughinbaugh with the matter while attorney is discussed more fully elsewhere in this brief. After the completion of the loan (R., 187), it was discovered by Mr. Acker that Aughinbaugh received from Bradshaw for his services the sum of $250; something more than eight times the amount ordinarily charged by title insurance companies in this District for the same character of service. The fact is evidenced by his receipt for the amount (R., 382). In reporting favorably on the title (R., 327), under date of May 26, 1893, several months after the property became involved in ejectment suits, no mention was made by him of the pendency thereof, although it does not affirmatively appear that he was aware of the fact.

In the light of the law applicable to the case, it is immaterial whether the officers of the local board were agents of the association or not. For the sake of the argument only, conceding them to have been agents, as parties to the fraud against the association, their knowledge cannot be imputed to the association, so as to render it guilty of bad faith.

Notice Through Agent—Agent's Fraud Relieves Principal.

Mechem on Agency, article 723:

"This presumption, however (communication to principal), will not prevail where it is certainly to be expected that the agent will not perform this duty, as where the agent, though nominally acting as such, is in reality acting in his own or another's interest and adversely to that of his principal."

Note, same article:

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception * * * in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

A number of cases are cited and discussed.

Sugden on Vendors, vol. 2, star p. 1043, sec. 20:

"Sir John Leach was of opinion that where an attorney had committed a fraud in obtaining an estate, and afterwards, upon the selling or mortgaging of it, acted as solicitor of the purchaser or mortgagee, the latter was fixed with notice of the fraud, for his solicitor was in full possession of knowledge of the fraud, which he had himself committed and the client was as much affected by his solicitor's knowledge of the fraud as if the solicitor had acquired that knowledge from a third person (Kennedy *vs.* Green, 3 Myl. & Kee., 699). But upon appeal, Lord Broughton, C., considered that as the solicitor was the actor in the fraud, the purchaser or mortgagee could not be held to have notice of the fraud any more than the party upon whom the fraud was committed."

Pomeroy's Equity Jurisprudence, vol. II, art. 675:

"AGENT'S FRAUD.—The second exception is much more important and of far wider application. It is now settled by a series of decisions possessing the highest authority, that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own clients, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed."

Cases cited.

It is thus clear that Mr. Justice Hagner, in the opinion adopted by the Court of Appeals, erred in considering the knowledge of these parties to the fraud as imputing knowledge to the association.

Dismissed Equity Suit.

(*b*) In imputing to the association knowledge of the averments of a dismissed equity suit which did not constitute a *lis pendens*.

On March 1, 1890 (R., 422), certain of the appellees filed a suit in equity against Walter *et al.*, among other things, for an injunction to restrain the clouding of the title to certain property, including that involved herein. As seen from a copy of the docket (R., 421), the temporary restraining order was discharged and injunction was denied August 10, 1890. November 30, 1890, time to file bill of revivor was limited to the February term. Same not being filed, on April 11, 1892, motion was made to dismiss for failure to prosecute. On January 28, 1893, testimony was ordered taken in 90 days. March 1, 1893, motion was made to dismiss for want of prosecution, which was granted by order passed July 1, 1893, when the suit was dismissed.

The certificate of title of the Real Estate Title Insurance Company, dated September 16, 1892 (R., 364), in respect to this suit said:

"On March 1, 1890, the heirs of Joseph R. Ashley filed a bill in equity (No. 12318) against John H. Walter, then the owner and whose title is now vested in Mrs. Hoagland, claiming to be owners of said land, but the record shows no title whatever in said heirs or in Joseph R. Ashley in his lifetime."

The certificate of title of W. E. Aughinbaugh, dated May 26, 1893 (R., 327), in respect to this suit says:

"Although the record shows absolutely no title to caption in Joseph R. Ashley when living, or in his heirs when dead, yet in March, 1890, the latter instituted proceedings in equity (cause 12318) against John H. Walter, whose title is now vested in said Hoagland, claiming to be the owner of said property. This proceeding is still pending, but the docket shows an undisposed-of motion made by the defendants to dismiss for failure to prosecute. I regard this suit as of no vital importance. It will undoubtedly be dismissed by the court."

The continuation of title, made by the District Title Insurance Company—Eugene Carusi, president—dated September 23, 1893 (R., 332), contains the following reference to this suit:

"Equity. 12318. Doc. 30.

"NEHEMIAH B. ASHLEY ET AL.
v.
"JOHN H. WALTER ET AL.

"JULY 1ST, 1893.

"Dismissed for want of prosecution, at complainants' cost, without prejudice."

In transmitting all of the papers, with detailed instructions, to Mr. Walter H. Acker, under date of October 23,

1893 (R., 317), the home office of the association, in respect to this matter, said:

"The case of N. B. Ashley *et al. vs.* J. H. Walter *et al.* must be fully and finally disposed of. Was this the effect of the decree of the 1st of July, 1893? We note in that decree the words 'without prejudice.' Please advise us as to the exact purport of this expression."

With all of these papers in hand, Mr. Acker correctly arrived at the conclusion that the dismissed equity suit had no effect, and he did not deem it necessary, or actually read the papers in that dismissed and abandoned suit or learn the nature of the allegations of the bill (R., 120).

His execution of the final certificate (R., 325) satisfied the mind of the general counsel of the association (R., 104). Said certificate contained the following words:

"That there are no proceedings commenced in the State or United States courts which affect this land * * * and that in my opinion the title is good and valid in fee simple in Aaron Bradshaw," etc.

It is thus seen that neither Mr. Acker nor any officer of the association had actual knowledge of the allegations of the abandoned bill in equity.

Equity Suit Not Notice.

To affect a purchaser with notice, there ought to be close and continuous prosecution of the *lis pendens*, and this is required by Lord Bacon's rule.

Sugden on Vendors, vol. 2, page 1046, article 24; 1st John Ch., 576.

The equity cause for injunction, being subject to dismissal for lack of prosecution, could not affect a purchaser with a notice; but, as a matter of fact as shown, it was finally dismissed, the cause being thereafter no longer *lis pendens* in

any sense, dismissal being naturally more conclusive to do away with notice than the want of close and continuous prosecution upon which the dismissal was based.

Encyclopedia Am. and Eng. Law, 1st ed., vol. 13, page 888.

"Of course *lis pendens* ends with the final dismissal of the cause, prior to the judgment or decree on the merits from whatever cause it occurred."

A voluntary abandonment or discontinuance destroys the *lis pendens.*

Wortham *vs.* Boyd, 66 Tex., p. 404.

"In order to affect * * * encumbrancer with constructive notice the suit must be prosecuted with all reasonable diligence and in good faith and without unreasonable delay, and a neglect to do so will relieve a purchaser without actual notice from the effect of *lis pendens.* * * * The object of the notice is * * * to bind the property, in whosoever hands it may be, with the decree when made in the cause. Hence if the suit be abandoned, or no decree made therein, the purchaser is not affected by the filing of the notice."

Opinion citing cases, 58 Mich., 308, Hammond *vs.* Paxton.

It is thus shown that Mr. Justice Hagner, in the opinion adopted by the Court of Appeals, erred in imputing knowledge to the association of the averments of the dismissed equity suit.

Ejectment Suits.

(*c.*) In imputing knowledge of the pendency of ejectment suits and finding that the defects in the court records and fraud did not relieve against or excuse lack of actual knowledge.

Assuming that the land involved could be brought into the ejectment suits by amendment, which is questioned,

the effect of the pendency of the ejectment suits, if properly entered and indexed, would have been record or constructive notice; but, in the determination of the good faith of a purchaser, the effect of constructive notice may be repelled by showing inquiry with due prudence and diligence, where the inquiry has proven futile. It has been shown above that the association was diligent and utilized the ordinary and proper means of inquiry as to the state of the title.

Assuming, notwithstanding the defects in the index, for the sake of the argument and not otherwise, that the pendency of these suits should have been discovered and reported by Aughinbaugh in his report of May 26, 1893, it has been shown above that his complicity in the fraud would relieve the association."

It is contended, therefore, that the association is relieved, by the inquiries made and the precautions taken, of the charge of bad faith in respect to the pendency of the ejectment suits, in the absence of actual knowledge thereof, independently of the defects in the records to be discussed below. In support of this contention attention is invited to the following authorities:

"To say that he was put upon inquiry, and having made all due investigation without obtaining any knowledge of title, he is still chargeable with notice of a deed, if one really did exist, would be absurd."

Rogers *vs.* Jones, 8 N. H., 269.

This decision is referred to with approval in Williamson *vs.* Brown, 15 N. Y., by Paige, J., p. 363; also by Selden, J., p. 362, who also says:

"This presumption, however (of being put on inquiry), is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."

The case of Jones *vs.* Smith (1 Hare, 43) is cited at page 360, where the purchaser made due inquiry, and the following quotation taken with approval:

"The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present."

Acer *vs.* Westcott, 46 N. Y., 384, 7 Am. Rep., 355; Peckham, J., cites above cases with approval and reviews the authorities at length. The decision (p. 357) quotes Lord Chancellor Cramworth in Ware *vs.* Egmont, 31 Eng. L. & Eq., 89, 97, who said:

"The question, where it is sought to affect a purchaser with constructive notice, is not whether he had means of obtaining, and might, by peculiar caution, have obtained the knowledge in question, but whether the not obtaining of it was an act of gross or culpable negligence." * * * "I must not part with this case without expressing my entire concurrence in what has, on many occasions of late years, fallen from judges of great eminence on the subject of constructive notice, that it is highly inexpedient for courts of equity to extend the doctrine."

See also Bryndon *vs.* Campbell and Governeur (40 Md., 338, 339).

In the case of Spencer *vs.* Spencer, 4 Jones Eq. N. C., 400, it was sought to set aside a conveyance of shares by an intended wife as fraudulent. The principle of constructive notice was invoked to sustain the deed, but the court said, page 410:

"In a case like the present, there is no room for a constructive notice. That is always resorted to for the purpose of preventing the person who has it from doing an act to the injury of another. Here the husband can injure no other person. He has rights which the rule protects by preventing another person from injuring him."

Errors in Docket and Indexes.

The appellant is further relieved and his good faith sustained by the errors in the docket and the indexes thereto, but for which the association's title examiner, Mr. Acker, would have discovered the ejectment suits. Among the assignments of error pertaining to the subject of good faith is assignment No. VII, charging errors as follows:

"In holding, in effect, that the omission of any reference to the land involved herein from the original docket of the court and the special docket index, both of which purported to show the land involved in the ejectment suits, and from the general index thereto, compiled by the clerk of the court at public expense and purporting to give a complete list of the lands in square 939 involved in ejectment suits, and the examination of said general index by the title examiner for the association, are not pertinent to the case at bar; that such general indexes were not required by law to be kept, and therefore a certified copy of the entries thereon is inadmissible in evidence; that the appellees were in no way responsible for such defects and cannot suffer by reason thereof; that no examiner of title can rely upon 'any marginal note,' but must examine the papers in the cases themselves; that it is nowhere alleged that the association or those who examined the records for it were misled by the failure of the clerk of the court to make additions to the docket and index book, and that there is no proof of such misleading; and in failing to take into consideration the state of the face of the docket, the special index thereto, and the examination of the general index corresponding therewith, as tending to show good faith."

By reference to the amendment to the bill (R., 50), treated as allowed by the courts below, it will be seen that it was averred that Mr. Acker and the District Title Insurance Company were both misled or failed to discover the pendency of the ejectment suits, by reason of the defect in the general numerical index to ejectment suits, and it is shown by the testimony, more particularly referred to below,

that said defects were directly caused by the omissions from the face of the docket and the docket index, with which the general index corresponded.

It further appears from the testimony that while Mr. Acker confined his examination to a period subsequent to the time this property was brought in by amendments (date of Aughinbaugh's report), yet by reason of his consulting the general numerical index, purporting to show all lands in square 939 involved in ejectment suits, he would have discovered and reported those suits but for the omissions on the face of the docket and the docket index, from which the general index was compiled.

Clearly, the court erred in not treating as admissible in evidence the certified copy of the general index, as the fact of its existence and examination by Mr. Acker is undoubtedly pertinent to the matter of good faith.

Under the authorities cited, it is not essential to the good faith of the appellant, in fact, that the dockets and indexes should have been required by law to be kept.

It is contended, however, that they were required by law to be kept.

The laws applicable to this District at the time, as to the duties of the clerk, provided:

"For making dockets and indexes, issuing venire, taxing costs and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars. * * * For searching the records of the court for judgments, decrees or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made. * * * All books in the offices of the clerks of the circuit and district courts containing the docket or minute of the judgments, or decrees thereof, shall, during office hours, be opened to the inspection of any person desiring to examine the same, without any fees or charge therefor" (Abert & Lovejoy, D. C. Stats., p. 415).

In addition to the above, the rules of court, formulated under the law, direct the clerk to keep dockets, a part of which, in fair construction, would be the general indexes as well as the special indexes relating to each docket. The numerical indexes of ejectment suits are a part of these indexes and the dockets to which they refer and would otherwise be proper books to be kept by the clerk for the inspection of attorneys and others.

The examination of all the original records or entries in ejectment and other suits, in behalf of purchasers of realty, is a physical impossibility and it is fair to contend that the clerk has authority to keep his dockets in such manner that they will subserve the purposes for which they are authorized.

In the case of the Washington, Alexandria and Georgetown Steam Packet Company *vs.* Sickles, 65th U. S. (24th Howard, 333), the court, referring to the effect of docket entries in the District of Columbia, said:

"The defendants objected to these docket entries as evidence of a verdict and judgment, but insisted they were simply memoranda or minutes, from which a record of a verdict and judgment were to be made. It appears that in the courts of this District, as in Maryland, the docket stands in the place of, or, perhaps, is, the record, and receives here all the consideration that is yielded to the formal record in other States. These memorials of their proceedings must be intelligible to the court that preserves them, as their only evidence, and we cannot, therefore, refuse to them faith and credit."

At the time the then ejectment suits were filed, in October, 1891, the clerk kept common-law dockets as he does now. In the caption of the dockets is a blank space for the designation of the character of the action and the land involved. At the appropriate place in this docket, numbered 36, in which all three of the suits are entered (R., 216, 221, and 225), there was entered as to each suit the words "Ejectment,

lot 1, square 939," and there was left plenty of room in the blank space below for the entry of any further land which might thereafter be brought into the suits. To avoid the necessity for any inspection of the face of the docket, thus kept under the law, there was also kept by the clerk, under the letter "E" (ejectments), a list of the numbers of all the ejectment cases in that docket, together with a description of the land involved in each, so that from this numerical index one could readily ascertain whether any given tract of land was involved in an ejectment suit entered in that docket. (For copy of said index for said volume see Record, 435.)

As seen, the land involved in this suit was not embraced in or affected by these ejectment suits until March, 1893; the certified copies, made subsequent to the institution of the suit at bar, show that the clerk had failed to add said land or make any note thereof, either on the face of the docket or in the index thereto (R., 435). Both counsel for the appellees (R., 444-445) and the clerk concede that this docket was required by law to be kept (R., 503).

The same error is also found in the general numerical index (R., 393) embracing said suits, which, as carefully prepared by the clerk and one of his assistants, has been on the shelves subject to use as public records since January, 1893 (R., 438).

There was an effort on the part of counsel for appellees and the clerk, in whose office the error occurred, to show that the general numerical index, covering the suits in question, was not required by law to be kept. It was admitted, however, by the clerk (R., 503) that it was compiled in the same way and under like authority as were the general indexes to equity suits, mechanics' liens and judgments; that, like such dockets, it was kept conveniently arranged (R., 441-442) for the use of attorneys, title examiners, or any one else desiring access thereto; that it was kept with the same care as if regarded by him as being required by

law (R., 504) and *was relied on by the clerk;* that " if a person comes in and wants to know about a certain ejectment suit or a certain piece of property, we can turn to the books and get it without running through each docket." It was admitted by Mr. Buhrman, witness for appellees who assisted the clerk in compiling the docket, that without such general numerical index or some data other than the description of the property, he knows of no way in which an ejectment suit affecting a given tract of land could be discovered (R., 444).

The contention of the clerk and his assistant to the effect that the general index to ejectment suits is not authorized by law would seem to be untenable and contrary to their own admitted attitude with respect thereto:

First, the docket was compiled by the clerk himself as a public officer, with the assistance of an employee of his office, and placed in convenient form with the further service of "the binder."

Where is the authority for the utilization of the time of the clerk and his assistant and the public binder, if the provision of law above quoted is inapplicable to such expenditures, under which he is allowed to exact fees "for making dockets and indexes," etc.?

Second, it is admitted that when the clerk's office makes an examination for land embraced in an ejectment suit the general indexes so compiled are used and utilized in making such search, and, as the clerk says, "we rely on them."

If such index is not one of "the records of the court," how is it that the clerk can rely on it in compliance with the provisions of the law above quoted, which says that a certain fee may be charged "for searching the records of the court, or other instruments, constituting a general lien on real estate?"

Mr. Acker testified that prior to November 1, 1893, when he made his final certificate, he examined this general index to ejectment suits (R., 204); that it did not show land in

controversy (R., 204); that the clerk's office then kept such separate book for ejectment suits (R., 204); that such numerical index does not give the name of the parties (R., 206); that the books to this date do not show the land in controversy (R., 206); that the indexes were found in the clerk's office on the shelves near judgment records; that such books are used by counsel and were so used when he made the examination of title (R., 206); that cases at law Nos. 39040, 39063, and 39064 were filed subsequent to date of examination of trust, September 30, 1893 (R., 265); that general Index No. 2, in which such later suits were afterwards entered (R., 393), was also on the shelves at the time he made his examination (R., 265), when he was diligently seeking to find out whether there was any suit at law or in equity (R., 205); that had he discovered the ejectment suits he would have communicated the fact to the company and turned down the title. The general attorney and the president of the association and assistant attorney and custodian of checks to be used on advances both testify that the knowledge of the slightest cloud on the title would have prevented an allowance of the loan; also that the discovery of the facts would have insured the stopping of advances at any stage in the progress of construction (R., 122).

In the case of Brydon *vs.* Campbell and Governeur (40 Md., 338-339), where, because of an error of a clerk in recording a deed, the purchaser was misled as to the true state of the title, in a suit brought in equity by the party bestowing the improvements, the one who stood by and permitted him to make valuable improvements was held to be estopped.

In passing upon the good faith of the appellant, therefore, the courts below erred in imputing knowledge of the pendency of the ejectment suits to the association.

Purchaser Bona Fide from Fraudulent Vendor Free from Effects of Fraud.

Under this head is considered the proposition (*d*) relating to the error of the Court of Appeals:

(*d*) In concluding, as an equitable doctrine, that the bad faith of the grantor, Bradshaw, passed by conveyance merely and must be imputed to the innocent grantee.

This question is raised by the fifth assignment of error, which is based upon the following language of said court (R., print 299):

"Nor can it be supposed that the grantee of an occupant in bad faith can have any better right than his grantor had."

The standing in equity of innocent grantees has been defined by this court in The Colorado Coal Company *vs.* United States, 123 U. S., 313.

"Mr. Justice Matthews, after stating the case, delivered the opinion of the court.

"It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a *bona fide* purchaser for value without notice is perfect."

This opinion has been approved in subsequent decisions of this court, and where a purchaser held under a quit-

claim deed (U. S. *vs.* California Land Company, 148 U. S., 31).

Concerning *bona fide* purchaser, Pomeroy's Equity Jurisprudence, article 754, says:

"There are two special rules on the subject that have been settled since an early day, one being a mere application of the general doctrine, and the other a necessary inference from it. The first is, that if a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a *bona fide* purchaser and is entitled to protection."

Note 1 to same:

"For the same reason, a purchaser for value and without notice from a vendor who has himself acquired his title through fraud becomes *bona fide* free from the effects of the fraud."

Good Faith Established.

In concluding this branch of the argument, it would seem difficult to conceive of a stronger or more perfect showing of good faith in a case of this kind than is presented by the record. The general officers, board of directors, and every agent or employee not implicated in fraud against the association are shown to have been without actual knowledge of the claims of the appellees whereon they alone could have and did recover the property in ejectment. The association took every reasonable and ordinary precaution, and its lack of actual knowledge is due to actual fraud on the part of officers of the local board, the grantor, Bradshaw, and the appellees. Furthermore, this fraud could not have been perpetrated but for actual and serious defects on the face of the court docket, the docket index thereto, and the general numerical index compiled therefrom.

The showing of good faith, in fact, is much stronger than is required by the authorities bearing on the subject. Many of the precautions actually taken in this case could have been

omitted, and still, under the authorities, the courts below should have held that the association acted in good faith.

For instance, in the case of Acer *vs.* Westcott (46 N. Y., 384; 7 Am. Rep., 359), cited above, Peckham, J., adds the following:

"In the language of the Lord Chancellor, Jones *vs.* Smith, 1 Phillips, 244-256, above referred to: 'Undoubtedly, in the present case a cautious, prudent circumspect person would not have advanced the money without the production of the deed; but that is not the principle on which cases of this sort have been decided.' Again: 'I do not consider this a case of gross negligence, but the party having only omitted that caution which a prudent, wary and cautious person might, and probably would, have adopted,' is not to be charged with notice. The majority of men (Judge Peckham adds) are not 'wary' and where no bad faith is found, the law does not usually require such conduct as can be expected only from the 'wary' to protect an innocent purchaser from loss."

Compare also the facts in this case with those in the case of Searl *vs.* School District (133 U. S., 553), where a conveyance was taken from squatters in the face of an outstanding United States patent and the improvements were erected against constant protest, yet the court held that the improver acted in good faith.

Indeed, in the first decision rendered in this country recognizing and sustaining the right of an improver, in the absence of estoppel, to receive compensation for the value of the improvements, the case of Bright *vs.* Boyd (1st Storey C. C., p. 478), there was a defect in the title which could not be remedied and which defect was clearly apparent upon the face of the records.

Whether Bradshaw and the others participating or with knowledge of the alleged frauds are grantors or agents of the appellant, from the standpoint of equity the appellant, as purchaser without notice and otherwise acting in good faith, is not to be imputed notice and thus deprived of relief. To apply, as a barrier to relief, the agents' knowledge or the

grantors' bad faith, when they are active in the fraud, would be to mock at equity and contrary to its well-settled method of procedure as to innocent purchasers and principals. The designing grantor or agent, and all others, beholding his guile and profiting thereby, would indeed be safe, if the victim can have no relief in equity by reason of imputed knowledge.

III.

Equitable Lien Independently of Estoppel.

Without reference to the connivance and estoppel of the appellees, the appellant, as receiver of the New South Building and Loan Association, an improver in good faith, is entitled in equity to a lien on the property to the extent of the value of the improvements bestowed with the funds of the association.

This proposition is based on the fourth assignment of error:

"In holding 'that an occupant of land, who has entered upon it in the honest belief that it is his own and who has in good faith improved it, is not entitled after having been evicted by the true and lawful owner, to claim an equitable lien for his improvements against such true and lawful owner,' and in following in this respect Anderson *vs.* Reed" (14 D. C. App., 54).

The appellant filed his bill in this case on May 3, 1901 (R., 1). On May 10, 1901, writs of possession in ejectment cases of appellees or their ancestors against Bradshaw were ordered, based upon judgments in case No. 32181, rendered October 14, 1897 (R., 407); in 32182, rendered May 3, 1901 (R., 410); in 32039, rendered May 10, 1901 (R., 396), and in 39040 (R., 413), rendered May 3, 1901, each judgment for an undivided one-fifth interest except in No. 32039, which was for an undivided two-fifths interest.

The first-mentioned case was decided by this court in favor of Nehemiah B. Ashley, ancestor of certain of the appellees in the case of Bradshaw *vs.* Ashley (180 U. S., 59).

The appellant, not being a party to any of the ejectment suits, could not proceed in equity to restrain prosecution thereof; and hence possession was acquired by appellees, under writs of possession, subsequent to the institution of this suit.

It is believed that the appellant has sustained his right to the relief sought under the doctrine of equitable estoppel which has been discussed above.

It is contended that, irrespective of that doctrine, he is entitled to the relief under the broad principles of equity in favor of an improver in good faith.

In the case of Anderson *vs.* Reed, the Court of Appeals, not properly construing, it is respectfully suggested, the case of Searl *vs.* School District, 133 U. S., 553, held to the contrary of this contention. In the latter case, in an opinion delivered by Mr. Chief Justice Fuller, the improvements placed upon land about to be recovered in ejectment were allowed to the improver, although there was no element of estoppel in the case, the true owner having given notice of his claim, based on a United States patent, before the improvements were made, and the improver relying upon the opinion of counsel, was held to be a purchaser in good faith. The opinion of this court in this case, Searl *vs.* School District, is apparently based upon the broad principle that the value of the improvements "could not justly be included in compensation" allowed the true owner (p. 565), which must be "just, not merely to the individual whose property is taken, but to the public which is to pay for it" (p. 562).

This court in that opinion, relating to proceedings in condemnation brought by the improver against the true owner as defendant, follows the equitable doctrine laid down in the case of Bright *vs.* Boyd (1 Storey C. C., 478-492 *et seq.*), in which Mr. Justice Joseph Storey, then an Associate Justice

of the Supreme Court of the United States, delivered, in 1841 a carefully prepared decision, broadly sustaining the doctrine that a purchaser in *good faith* of a title, shown by the records to be fatally defective, is entitled as plaintiff to relief in an equity court to the extent of the value of the improvements bestowed upon the land as against a successful plaintiff in ejectment, the latter being a minor and non-resident of the State where the land was located when the improvements were made.

The importance of the case and the pertinency of the reasoning justifies the following extended quotation therefrom. Mr. Justice Storey said:

"So that, in fact, the whole reliance of the plaintiff must be upon the aid of a court of equity to decree an allowance to him for the improvements, made by him, and those, under whom he claims, upon its own independent principles of general justice.

"Two views are presented for consideration. First, that the defendant has lain by, and allowed the improvements to be made, without giving any notice to the plaintiff, or to those, under whom he claims, of any defect in their title; which of itself constitutes a just ground of relief. Secondly, that if the defendant is not, by reason of his minority and residence in another State at the time, affected by this equity, as a case of constructive fraud or concealment of title; yet, that as the improvements were made *bona fide,* and without notice of any defect of title, and have permanently enhanced the value of the lands, to the extent of such enhanced value the defendant is bound in conscience to make compensation to the plaintiff *ex æquo et bono.*

"In regard to the first point, it has been well remarked by Sir William Grant (then master of the rolls) in *Pilling vs. Armitage* (12 Ves., 84, 85), 'That there are different positions in the books with regard to the sort of equity, arising from laying out money upon another's estate through inadvertence or mistake; that person, seeing that, and not interfering to put the party upon his guard. The case with reference to that proposition, as ordinarily stated, is that of building upon another man's ground. That is a case, which supposes a total absence of title on the one side, implying,

therefore, that the act must be done of necessity under the influence of mistake; and undoubtedly it may be expected, that the party should advertise the other, that he is acting under a mistake.' The learned judge is clearly right in this view of the doctrine; and the duty of compensation in such cases, at least, to the extent of the permanent increase of value is founded upon the constructive fraud, or gross negligence, or delusive confidence held out by the owner; for under such circumstances the maxim applies: *Qui tacet, consentire videtur; Qui potest, et debet vetare, jubet, si non vetat.* Whether this doctrine is applicable to minors, who stand by, and make no objection, and disclose no adverse title, having a reasonable discretion from their age to understand, and to act upon the subject; and whether, if under guardianship, the guardian would be bound to disclose the title of his ward; and how far the latter would be bound by the silence or negligence of his guardian; and whether there is any just distinction between minors, living within the State, and minors, living without the State; these are questions of no inconsiderable delicacy and importance, upon which I should not incline to pass any absolute opinion in the present state of the cause, reserving them for further consideration, when all the facts shall appear upon the report of the master. There are certainly cases, in which infants themselves will be held responsible in courts of equity for their fraudulent concealments and misrepresentations, whereby other innocent persons are injured.

"The other question, as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value, under a title, which turns out defective, he having no notice of the defect, is one, upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono,* I own, that there does not seem to me any just ground to doubt, that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, *Nemo debet locupletari ex alterius incommodo;* or, as it is still more exactly expressed in the Digest, *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiorem.* I am aware, that the doctrine has not as yet

been carried to such an extent in our courts of equity. In cases, where the true owner of an estate, after a recovery thereof at law, from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity, as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements, which he has beneficially made upon the estate; and thus to recoup them from the rents and profits. So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enfore that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he, who seeks equity, must do equity. But it has been supposed, that courts of equity do not, and ought not to go further, and to grant active relief in favor of such a *bona fide* possessor, making permanent meliorations and improvements, by sustaining a bill, brought by him therefor, against the true owner, after he has recovered the premises at law. I find, that Mr. Chancellor *Walworth*, in *Putnam vs. Ritchie* (6 Paige R., 390, 403, 404, 405), entertained this opinion, admitting at the same time, that he could find no case in England or America, where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess, that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. *Take the case of a vacant lot in the city, where a bona fide purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just, that in such a case, the true owner should recover and possess the whole, without any compensation whatever to the bona fide purchaser? To me it seems manifestly unjust and inequitable, thus to appropriate to one man the*

property and money of another, who is in no default. The argument, I am aware, is, that the moment the house is built, it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold, what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection; but, merely and dryly stating, that the law so holds. But, then, admitting this to be so, does it not furnish a strong ground why equity should interpose, and grant relief?" (Italics supplied.)

"I have ventured to suggest, that the claim of the *bona fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and in this view of the matter, I am supported by the positive dictates of the Roman law. The passage already cited, shows it to be founded in the clearest natural equity. *Jure naturæ æquum est.* And the Roman law treats the claim of the true owner, without making any compensation under such circumstances, as a case of fraud or ill faith. *Certe* (say the institutes) *illud constat; si in possessione constituto ædificatore, soli Dominus petat domum suam esse, me solvat pretium materiæ et mercedes fabrorum; posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor, qui ædificavit. Nam scienti, alienum solum esse, potest objici culpa quod ædificaverit temere in eo solo, quod intelligebat alienum esse.* It is a grave mistake, sometimes made, that the Roman law merely confined its equity or remedial justice, on this subject, to a mere reduction from the amount of the rents and profits of the land. The general doctrine is fully expounded and supported in the Digest, where it is applied, not to all expenditures upon the estate, but to such expenditures only as have enhanced the value of the estate, *(quatenus pretiosior res facta est,)* and beyond what he has been reimbursed by the rents and profits. The like principle has been adopted into the law of the modern nations, which have derived their jurisprudence from the Roman law; and it is especially recognized in France, and enforced by Pothier, with his accustomed strong sense of equity, and general justice, and urgent reasoning. Indeed, some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a *mala fide* possessor ought to have

an allowance of all expenses, which have enhanced the value of the estate, so far as the increased value exists.

"The law of Scotland has allowed the like recompense to *bona fide* possessors, making valuable and permanent improvements; and some of the jurists of that country have extended the benefit to *mala fide* possessors to a limited extent. The law of Spain affords the like protection and recompense to *bona fide* possessors, as founded in natural justice and equity. Grotius, Puffendorf, and Rutherforth, all affirm the same doctrine, as founded in the truest principles *ex æquo et bono.*"

The opinion of the Court of Appeals in Anderson *vs.* Reed concedes that the doctrine of Mr. Justice Storey in Bright *vs.* Boyd has been adopted and followed by other equity courts, citing cases of Thomas *vs.* Thomas, 16 B. Monroe, 421; Vallee *vs.* Fleming, 16 Mo., 152; Hatcher *vs.* Briggs, 6 Oregon, 131; McKelway *vs.* Armour, 10 N. J. Equity, 115, and Union Hall Association *vs.* Morrison, 39 Md., in all of which the opinion of Mr. Justice Storey in the case of Bright *vs.* Boyd is accepted and emphatically endorsed.

The Court of Appeals refuses to follow Bright *vs.* Boyd, though bowing before the truth of the principle it sets forth, because this court, following the same principle, in Searl *vs.* School District (*supra*) does not cite that case.

The opinion of the Court of Appeals further cites Williams *vs.* Gibbs, 20 How., 535, and quotes therefrom the following:

"Courts of equity, it would seem, do not grant active relief in favor of a *bona fide* purchaser, making permanent meliorations or improvements, by sustaining a bill brought by him against the true owner, after he has succeeded in recovering the property at law."

The use of the words "*it would seem*" by the court in that case and the further fact of the principle suggested not being essential to the determination of that case might well lead to doubt as to whether this court intended the suggestion as an authoritative exposition of the law. However that may

be, the apportionment, in Searl *vs.* School District, of the benefits of improvements to the innocent purchaser and denial of such benefits to the true owner of the land is a clear, emphatic, and conclusive application of the doctrine *ex æquo et bono*, and constitutes the last expression of this court on this subject.

Conclusion.

In conclusion, it is urged that the appellant, as an improver in good faith, is entitled to the relief sought, both on the ground of equitable estoppel and the principle enunciated in Bright *vs.* Boyd and applied by this court in the case of Searle *vs.* School District.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 122.

ARMSTRONG, APPELLANT, *v.* ASHLEY ET AL, APPELLEES.

Additional Authorities for Insertion in Appellant's Brief.

Page 32: Averments in bill that appellees "knew that said expenditure was being made," and also that they "knew advances would and could not have been made * * * save through fraud and deceit of some party interested in securing the said loan," being facts within the knowledge of the appellees, must be taken as confessed; and, by reason of the evasion in the joint answer, in this and other particulars, must be construed most unfavorably to the appellees.

Cyc., vol. 16, pp. 312, 313.

Grady *et al. v.* Robinson, 28 Ala., 300.

Page 34: The duty to speak is not relieved, even by a judgment of record.

Delett *v.* Kemble, 23 N. J. Eq., 58.

The final judgment in a suit which is *lis pendens* may bind the one purchasing, as to the value of the property at the time of purchase; but a court of equity will protect purchaser in his improvements innocently bestowed.

Murray *et al. v.* Ballou (1 Johnson's Ch., 531).

Record or constructive notice is available against purchaser in good faith only to the extent shown by record made by clerk.

Frost *et al. v.* Beekman (1 Johnson's Ch., 288).

Brydon *v.* Campbell *et al.* (40 Md., 331).

But where the true owner relies on supposed record notice, and purchaser improves, latter will be protected in equity even as to part revealed by record.

Brydon *v.* Campbell *et al.* (*supra*).

Where a person or his family gets the benefits of an advance under a mortgage, made without his knowledge or consent, and the improvements were erected on his land in his absence and without his knowledge, if he afterwards enjoys the benefits, equity estops him from denying the lien.

Brown *et al. v.* Insurance Company, 32 N. J. Eq., 809.

Estoppel applies to infants as well as adults.

Gatling *v.* Rodman, 6 Ind., 289, and cases cited.

Page 36: New matter in answer, by way of defense, must be proven.

Cyc., vol. 16, p. 386.

Marmion *v.* McClellan, 11th App. D. C., 467-485.

Gordon *v.* Dexter, 11th App. D. C., 60, 62.

Page 62: Even where there is actual knowledge of outstanding claim, the improver who takes title and makes improvements after advice of counsel against validity of outstanding claim may be an improver in good faith and is entitled to relief.

Jones, administrator, *v.* Jones, 4th Gill., 87-103.

Page 65: Docket entries are receivable in evidence.

Phil., Wil. & Balto. R. R. Co. *v.* Howard (13 How., 307-331).

Thaw *v.* Ritchie (136 U. S., 519-547).

In re Coleman (15 Blatchford, 425-426).

Last-named case involved "Naturalization Index," for preparation of which there was no order of court; the fact that it was kept was construed as making it a part of the records of the court.

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